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S. HRG. 99-626

NOMINATION

#190 ORIGINAL

HEARINGS

BEFORE THE

282

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

JEFFREY IRA ZUCKERMAN, OF VIRGINIA, TO BE GENERAL COUNSEL OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DECEMBER 10, 1985; MARCH 4 AND APRIL 9, 1986

Printed for the use of the Committee on Labor and Human Resources

U.S. GOVERNMENT PRINTING OFFICE

57-682 O WASHINGTON : 1986

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

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NOMINATION

TUESDAY, DECEMBER 10, 1985

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10:35 a.m., in room SD-430, Dirksen Senate Office Building, Senator Orrin Hatch (chairman) presiding.

Present: Senators Hatch, Metzenbaum, Pell, Nickles, Dodd, and Simon.

OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. The committee will come to order, and I am sorry we are starting 5 minutes late.

Today, we are here to consider the nomination of Jeffrey Ira Zuckerman to be General Counsel of the Equal Employment Opportunity Commission.

Mr. Zuckerman is presently serving as Chief of Staff in the Office of the Chairman of the Equal Employment Opportunity Commission. Prior to this position, he served as a special assistant to the Assistant Attorney General in the Antitrust Division at the Department of Justice.

Mr. Zuckerman is a graduate of the Yale Law School, where he served on the Board of Editors of the Yale Law Journal. He has clerked for the Honorable Robert P. Anderson in the U.S. Court of Appeals for the Second Circuit and was an associate with the firm of Sullivan & Cromwell, certainly one of the recognized law firms in the country.

I understand that some of my colleagues have some concern with Mr. Zuckerman's apparent lack of trial experience in EEO matters. Consequently, the staff has been directed to conduct an extremely thorough review of Mr. Zuckerman's work at the Commission.

Anyone who has taken the time to read through all of the documents submitted to the committee or who has met with Mr. Zuckerman will realize that he has a solid understanding of the law and a firm comprehension of the practices and policies of the EEOC.

I believe Mr. Zuckerman will be a valuable asset as General Counsel of the EEOC. His cooperativeness, patience and thoroughness in assisting the committee in its review speak volumes about how he approaches his work. I am also confident that he will diligently enforce the law in a fair and judicious manner.

I would like to address one procedural issue. As most of us know, almost all of the documents submitted to the committee in conjunction with this hearing involve privileged information—information

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which if released or leaked from the committee could jeopardize the rights of parties currently in litigation or who may yet enter into litigation. A memorandum of understanding has been reached among committee members concerning our handling of these documents.

I would like to thank Senators Kennedy and Metzenbaum at the outset for their assistance in balancing these particular competing interests—the interest of the committee in having access to the Commission documents to determine Mr. Zuckerman's treatment of key issues, and the interest, or more accurately, the obligation, of the EEOC to keep many of these same issues confidential. The memorandum strikes a legitimate balance.

Now, as I understand, during the hearing we will not refer to the covered documents by name or include them in the record, but if it is necessary to quote from or reference a document, it will be referred to by its assigned number. Upon completion of the nomination process, all copies of the documents will be returned to the EEOC.

It is my hope that we will be able to move forward on Mr. Zuckerman's nomination in an expeditious manner. I am sure we all will agree that the Commission deserves to have a General Counsel who has been confirmed by the Senate, and I hope that such confirmation will occur before Congress adjourns at Christmastime.

At this point, we will turn to Senator Simon.

Senator SIMON. Thank you, Mr. Chairman, and I apologize in advance to you and to the witness for not being able to stay here. We are in this crazy circus here, running around.

There is no question in my mind on your ability, and I found nothing in the opening statement of the Chairman in describing your virtues with which I disagree. And if you were up for Ambassador to Denmark or some key position in the State of Ohio, I would be very pleased to support you.

I guess there is a concern in my mind, and from what I hear, in the minds of some others, of your commitment to really moving on this problem of discrimination in our society. And that is the basic concern that I have.

I will be submitting some written questions that I would appreciate having answered by you for the record, so that I can see them.

One of my concerns, for example, is that according to my staff, it appears from reviewing the litigation records of the Commission since the time you have been in your position as Acting General Counsel, there has been a marked decline in the number of cases, excluding procedural enforcement actions, brought by the Equal Employment Opportunity Commission.

I hope in your testimony you will address the question of your commitment to really, really moving. And I guess I am looking for more than just a theoretical commitment. I am looking for something you have done, something in your record, that has really indicated this is not just another assignment, that you really are desirous of doing a substantial job that will reflect credit on you and credit on the country.

And again, there is no question from what I have seen about your ability, about your integrity. The question is commitment.

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Thank you, Mr. Chairman, and I am sorry to be in and out like this.

The CHAIRMAN. Well, thank you, Senator Simon. We understand. We are all busy here, and we all have especially difficult times at this time of year.

So we will turn to Senator Metzenbaum at this time.

Senator METZENBAUM. Mr. Zuckerman, it is nice to welcome you here this morning and your family. I share with Senator Simon his concerns about your commitment to the question of equality of all people, and the obligation of the Government to be involved. And I must say that you are a rather young man, but you have established quite a reputation for yourself—I am not exactly certain that I think it is that great a reputation, but it is quite a reputation.

And I am concerned about not alone your sense of commitment, but your adherence to the law, and I am concerned that there are many in this present administration who do not like the way the laws are written or have been interpreted, and like Mr. Baxter when he headed up the Antitrust Division, indicated that it would be their laws that would govern.

You are up for appointment to a very sensitive position, and it is questionable whether somebody who is the General Counsel for the Equal Employment Opportunity Commission has, by his past actions, indicated that sense of dedication to the objective of that Commission, and therefore, I will make inquiry of you concerning some of your previous actions.

In December of 1984, you wrote a memo to the Chairman——

The CHAIRMAN. Senator Metzenbaum, he has not even had a chance to respond. We are just giving opening statements right now. But we will return to you.

Senator METZENBAUM. I am sorry. I did not mean to be premature. I came in late.

The CHAIRMAN. No; that is fine. But why don't we let Mr. Zuckerman make his opening statement.

Senator METZENBAUM. Of course.

The CHAIRMAN. Although I would appreciate it if you would summarize, Mr. Zuckerman. We will put your full statement in the record, and if you could in just a few minutes or so, tell us what you feel.

We are happy to welcome your family here. We would like you to introduce them to us, and then we will open it up for questions and see what we can do to resolve any problems that exist.

STATEMENT OF JEFFREY IRA ZUCKERMAN, NOMINATED TO BE GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. ZUCKERMAN. Thank you, Mr. Chairman, and good morning to you and to members of the committee.

With me today is my wife, Miriam——

The CHAIRMAN. Miriam, we are happy to have you here.

Mr. ZUCKERMAN [continuing]. And all four of our children; my parents——

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Senator METZENBAUM. The children are supposed to wave at this point. [Laughter.]

Mr. ZUCKERMAN [continuing]. And my wife's parents.

The CHAIRMAN. We are very happy to welcome all of you here. You have a truly intelligent son; I have a lot of respect for him and for the experience that he has gone through. This is a difficult agency and always creates a lot of heat, because all of us are concerned about how it functions and how it works, and this committee has the oversight to do that.

But we are very proud of your son, and very proud of your husband and your father, kids; we are happy to have you here as well. What a fine-looking family you have.

We will turn the time over to you, Mr. Zuckerman.

Mr. ZUCKERMAN. Thank you again, Mr. Chairman.

I would also like to note at the outset my appreciation and the Commission's appreciation of the committee's consideration to the Commission's concerns with respect to the confidentiality of many of the documents I have submitted to the committee. We appreciate very much the committee's cooperation.

It is an honor and a privilege to appear before you today as the committee considers my nomination to serve as General Counsel of the Equal Employment Opportunity Commission.

For the past 16 months, as Chief of Staff in the Office of the Chairman of the Commission, I have had the opportunity to work with the Commission toward enhancing the effectiveness of the Commission in combating unlawful employment discrimination. I hope that you will allow me the opportunity to continue this work as General Counsel of the Commission.

It is now some 20 years ago, with the enactment of title VII of the Civil Rights Act of 1964, that this country established as a matter of national policy and law that employers, employment agencies, and labor organizations may not discriminate on the basis of race, color, sex, religion, or national origin.

One year earlier, the Equal Pay Act of 1963 established that men and women must receive equal pay for equal work. The Age Discrimination in Employment Act of 1967 made age an unacceptable and unlawful basis for employment decisions. And the Rehabilitation Act of 1973 prohibits Federal agencies from discriminating against handicapped individuals, and requires them to meet the special needs of handicapped employees.

These statutes share a common purpose: In the workplace, people should be judged on the basis of what they can do, not on the basis of irrelevant personal characteristics.

The mission of the EEOC is to turn this goal into a reality. I pledge to you, and I pledge to the American people, that if I am confirmed as General Counsel of the Commission, I shall devote myself, my time, and all my abilities to this mission, because I share the goal.

The statutes that the Commission enforces in the private sector protect and are critically important to all Americans.

It was discrimination on the basis of race and color that prompted the enactment of title VII, and discrimination against black people in America has been and continues to be a national disgrace, a sordid blot upon the history of this country.

The past 20 years have witnessed enormous progress in this area, but the battle is far from over. Title VII has been and remains a key weapon in the struggle for equal employment opportunity for black Americans. It must be wielded vigorously and effectively if we are ever to root out the evil of race discrimination once and for all. That is a goal that I share.

When title VII's prohibition against sex discrimination was added to the statute, few foresaw the social revolution in this country that would shortly bring millions of women into the workforce. Title VII, coupled with the Equal Pay Act, has greatly facilitated this revolution. Again, however, while much has been achieved, there is much more to be done.

Title VII's prohibition against religious discrimination and its requirement that employers reasonably accommodate their employees' religious observances and practices, opened new vistas of opportunity for those of us who observe minority religions, with Sabbaths other than Sunday and holy days that have not been incorporated into the civil calendar.

Moreover, in recent years, with the demise of Sunday closing laws, these same provisions have come to protect the interest of Christians in observing the Sabbath on Sunday. Whatever the religion, whatever day the Sabbath or holy day, the Commission must be prepared to vindicate the rights of the observer.

Discrimination on the basis of national origin has a long, sordid history in this country. Once it was signs that said, "No Irish need apply." Today it is employers who do not hire Hispanics, or immigrants from Asia. Neither its age nor its currency commends this discrimination, however. And indeed, this is an area that requires special attention by the Commission.

Certain groups of Americans believe that the EEOC does not care about discrimination on the basis of national origin. Whatever may have been the situation in the past, the present Commissioners are all determined and committed to eradicate this insidious discrimination. I share their determination; I share their commitment.

The Age Discrimination in Employment Act has done a great deal to change the environment in which older Americans work. But as with all the other areas with which we are concerned, the issue has only been joined; the problem has not yet been solved. There is much more we must do to protect older workers from the indignities they suffer at the hands of some employers.

It is the hope that those subject to these statutes will comply with them voluntarily. And where violations occur, the statutes require that the Commission seek redress through informal methods of conference, conciliation, and persuasion. But the ultimate tool to secure compliance and redress is litigation. The General Counsel is responsible for conducting the Commission's enforcement litigation.

My goal, with your consent, is to conduct that litigation in the most effective and vigorous way possible, in order to achieve the goal of the statutes that people be judged in the workplace on the basis of what they can do.

For the first 7 years of the Commission's existence, it had no litigation authority. Then, for 12 years, it exercised its authority in a rather uneven fashion, leaving most people who suffered discrimi-

nation to fend for themselves. The present Commission has radically changed this approach.

In September 1984, the Commission adopted a new enforcement policy. In February 1985, it adopted a new policy on relief. Together, these policies commit this Commission to bring suit whenever and wherever it finds discrimination, to secure full relief for all those who suffer discrimination, and to require affirmative action by those who discriminate. This affirmative action must eliminate the cause of the past violation and ensure nondiscrimination in the future.

This tough new approach is transforming the Commission into an effective law enforcement agency. I look forward, with your consent, to implementing the Commission's policies, to securing full relief for all who suffer employment discrimination, and to increasing substantially compliance with the statutes' prohibitions.

With your consent, I look forward to continuing to work with the Commission as its General Counsel, and with this committee, toward achieving the goal we all share—a work environment free from invidious discrimination.

At this time, I would be happy to answer any questions you may have.

[The prepared statement and biographical sketch of Mr. Zuckerman follow:]

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STATEMENT OF JEFFREY I. ZUCKERMAN

NOMINEE FOR GENERAL COUNSEL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DECEMBER 10, 1985

GOOD MORNING MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE.

IT IS AN HONOR AND A PRIVILEGE TO APPEAR BEFORE YOU TODAY AS YOU CONSIDER MY NOMINATION TO SERVE AS GENERAL COUNSEL OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. FOR THE PAST SIXTEEN MONTHS, AS CHIEF OF STAFF IN THE OFFICE OF THE CHAIRMAN OF THE COMMISSION, I HAVE HAD THE OPPORTUNITY TO WORK WITH CHAIRMAN THOMAS AND THE OTHER COMMISSIONERS TOWARD ENHANCING THE EFFECTIVENESS OF THE COMMISSION IN COMBATING UNLAWFUL EMPLOYMENT DISCRIMINATION. I HOPE THAT YOU WILL PERMIT ME TO CONTINUE THIS WORK AS GENERAL COUNSEL OF THE COMMISSION.

SOME TWENTY YEARS AGO, WITH THE ENACTMENT OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, THIS COUNTRY ESTABLISHED AS A MATTER OF NATIONAL POLICY AND LAW THAT EMPLOYERS, EMPLOYMENT AGENCIES AND LABOR ORGANIZATIONS MAY NOT DISCRIMINATE ON THE BASIS OF RACE, COLOR, SEX, RELIGION OR NATIONAL ORIGIN. ONE YEAR EARLIER, THE EQUAL PAY ACT OF 1963 ESTABLISHED THAT MEN AND WOMEN MUST RECEIVE EQUAL PAY FOR EQUAL WORK. THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 MADE AGE AN UNACCEPTABLE AND UNLAWFUL BASIS FOR EMPLOYMENT DISCRIMINATION. AND THE REHABILITATION ACT OF 1973 PROHIBITS FEDERAL AGENCIES FROM DISCRIMINATING AGAINST HANDICAPPED INDIVIDUALS, AND REQUIRES

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THE AGENCIES TO MEET THE SPECIAL NEEDS OF HANDICAPPED EMPLOYEES.

THESE STATUTES SHARE A COMMON PURPOSE: IN THE WORKPLACE, PEOPLE SHOULD BE JUDGED ON THE BASIS OF WHAT THEY CAN DO, NOT ON THE BASIS OF IRRELEVANT PERSONAL CHARACTERISTICS. THE MISSION OF THE EEOC IS TO TURN THIS GOAL INTO A REALITY. I PLEDGE TO YOU, AND TO THE AMERICAN PEOPLE, THAT IF I AM CONFIRMED AS GENERAL COUNSEL OF THE COMMISSION, I SHALL DEVOTE MYSELF TO THIS MISSION.

THE STATUTES THAT THE EEOC ENFORCES IN THE PRIVATE SECTOR PROTECT, AND ARE CRITICALLY IMPORTANT TO, ALL AMERICANS.

IT WAS DISCRIMINATION ON THE BASIS OF RACE AND COLOR THAT PROMPTED THE ENACTMENT OF TITLE VII. DISCRIMINATION AGAINST BLACK PEOPLE IN AMERICA HAS BEEN, AND CONTINUES TO BE, A NATIONAL DISGRACE -- A SORDID BLOT UPON THE HISTORY OF THIS COUNTRY. THE PAST TWENTY YEARS HAVE WITNESSED ENORMOUS PROGRESS IN THIS AREA, BUT THE BATTLE IS FAR FROM OVER. TITLE VII HAS BEEN, AND REMAINS, A KEY WEAPON IN THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY FOR BLACK AMERICANS. IT MUST BE WIELDED VIGOROUSLY AND EFFECTIVELY IF WE ARE EVER TO ROOT OUT THE EVIL OF RACE DISCRIMINATION ONCE AND FOR ALL.

WHEN TITLE VII'S PROHIBITION AGAINST SEX DISCRIMINATION WAS ADDED TO THE STATUTE, FEW FORESAW THE SOCIAL REVOLUTION IN THIS COUNTRY THAT WOULD SHORTLY BRING MILLIONS OF WOMEN INTO THE WORKFORCE. TITLE VII, COUPLED WITH THE EQUAL PAY ACT, HAS GREATLY FACILITATED THIS REVOLUTION. AGAIN, HOWEVER, WHILE MUCH HAS BEEN ACHIEVED, THERE IS MUCH MORE TO BE DONE.

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TITLE VII'S PROHIBITION AGAINST RELIGIOUS DISCRIMINATION, AND ITS REQUIREMENT THAT EMPLOYERS REASONABLY ACCOMMODATE THEIR EMPLOYEES' RELIGIOUS OBSERVANCES AND PRACTICES, OPENED NEW VISTAS OF OPPORTUNITY FOR THOSE OF US WHO OBSERVE MINORITY RELIGIONS, WITH SABBATHS OTHER THAN SUNDAY AND HOLY DAYS THAT HAVE NOT BEEN INCORPORATED INTO THE CIVIL CALENDAR. MOREOVER, IN RECENT YEARS, WITH THE DEMISE OF SUNDAY CLOSING LAWS, THESE SAME PROVISIONS HAVE COME TO PROTECT THE INTEREST OF CHRISTIANS IN OBSERVING THE SABBATH ON SUNDAY. WHATEVER THE RELIGION, WHATEVER DAY THE SABBATH OR HOLY DAY, THE COMMISSION MUST BE PREPARED TO VINDICATE THE RIGHTS OF THE OBSERVER.

DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN IS AS OLD AS THE SIGNS THAT SAID "NO IRISH NEED APPLY," ANND AS NEW AS EMPLOYERS WHO DO NOT HIRE HISPANICS. NEITHER ITS AGE NOR ITS CURRENCY COMMENDS IT, HOWEVER. INDEED, THIS IS AN AREA THAT REQUIRES SPECIAL ATTENTION BY THE COMMISSION. CERTAIN GROUPS OF AMERICANS BELIEVE THAT THE EEOC DOES NOT CARE ABOUT DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN. WHATEVER MAY HAVE BEEN THE SITUATION IN THE PAST, I KNOW THAT THE PRESENT COMMISSIONERS ARE ALL DETERMINED TO ERADICATE THIS INSIDIOUS DISCRIMINATION. I SHARE THEIR DETERMINATION; I SHARE THEIR COMMITMENT.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT HAS DONE A GREAT DEAL TO CHANGE THE ENVIRONMENT IN WHICH OLDER AMERICANS WORK. BUT, AS WITH ALL THE OTHER AREAS WITHIN THE COMMISSION'S JURISDICTION, THE ISSUE HAS ONLY BEEN JOINED, THE PROBLEM HAS NOT YET BEEN SOLVED. THERE IS MUCH MORE WE MUST DO TO PROTECT

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OLDER WORKERS FROM THE INDIGNITIES THEY SUFFER AT THE HANDS OF SOME EMPLOYERS.

IT IS, OF COURSE, THE HOPE THAT THOSE SUBJECT TO THESE STATUTES WILL COMPLY WITH THEM VOLUNTARILY. AND WHERE VIOLATIONS OCCUR, THE STATUTES REQUIRE THAT THE COMMISSION SEEK REDRESS THROUGH INFORMAL METHODS OF CONFERENCE, CONCILIATION AND PERSUASION. BUT THE ULTIMATE TOOL TO SECURE COMPLIANCE AND REDRESS IS LITIGATION. THE GENERAL COUNSEL IS RESPONSIBLE FOR CONDUCTING THE COMMISSION'S ENFORCEMENT LITIGATION.

FOR THE FIRST SEVEN YEARS OF THE COMMISSION'S EXISTENCE IT HAD NO LITIGATION AUTHORITY. THEN FOR TWELVE YEARS IT EXERCISED ITS AUTHORITY IN AN UNEVEN FASHION, LEAVING MOST PEOPLE WHO SUFFERED EMPLOYMENT DISCRIMINATION TO FEND FOR THEMSELVES. THE PRESENT COMMISSION HAS RADICALLY CHANGED THIS APPROACH.

IN SEPTEMBER 1984 THE COMMISSION ADOPTED A NEW ENFORCEMENT POLICY. IN FEBRUARY 1985 IT ADOPTED A NEW POLICY ON RELIEF. TOGETHER, THESE POLICIES COMMIT THIS COMMISSION TO BRING SUIT WHENEVER AND WHEREVER IT FINDS DISCRIMINATION; TO SECURE FULL RELIEF FOR ALL THOSE WHO SUFFER DISCRIMINATION; AND TO REQUIRE AFFIRMATIVE ACTION BY THOSE WHO DISCRIMINATE. THIS AFFIRMATIVE ACTION MUST ELIMINATE THE CAUSE OF THE PAST VIOLATION, AND ENSURE NON-DISCRIMINATION IN THE FUTURE.

THIS TOUGH NEW APPROACH IS TRANSFORMING THE COMMISSION INTO AN EFFECTIVE LAW ENFORCEMENT AGENCY. I LOOK FORWARD, WITH YOUR CONSENT, TO IMPLEMENTING THE COMMISSION'S POLICIES -- TO SECURING FULL RELIEF FOR ALL WHO SUFFER EMPLOYMENT DISCRIMINATION AND

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INCREASING SUBSTANTIALLY COMPLIANCE WITH THE STATUTES' PROHIBITIONS.

THE INITIAL RESULTS OF THE COMMISSION'S NEW APPROACH ARE IN: FY 1985 WITNESSED SIGNIFICANT RISES IN CASES FILED BY THE COMMISSION AND DOLLAR BENEFITS SECURED FOR THE VICTIMS OF DISCRIMINATION. BUT THIS IS ONLY THE BEGINNING. WE MUST KEEP UP THE PRESSURE AGAINST THOSE WHO VIOLATE THE LAW BY CONTINUING TO FILE NEW CASES WHENEVER DISCRIMINATION OCCURS. AND IT IS NOT ENOUGH MERELY TO FILE CASES; THEY MUST BE PROSECUTED VIGOROUSLY, TO VINDICATE THE RIGHTS OF THOSE WHO HAVE SUFFERED UNLAWFUL DISCRIMINATION AND TO DETER FUTURE VIOLATION.

THE EEOC'S ENFORCEMENT LITIGATION WILL BE CRITICAL TO THE COMMISSION'S SUCCESS IN ITS MISSION: TO HAVE PEOPLE IN THE WORKPLACE JUDGED ON THEIR ABILITIES, NOT ON THE IRRELEVANT AND ILLEGAL BASES OF RACE, COLOR, SEX, RELIGION, NATIONAL ORIGIN, AGE OR HANDICAP.

THE CHALLENGE FACING THE NEXT GENERAL COUNSEL OF THE COMMISSION IS TO CONDUCT THIS LITIGATION EFFECTIVELY. FOR THE PAST SIXTEEN MONTHS, AS CHIEF OF STAFF IN THE OFFICE OF THE CHAIRMAN OF THE COMMISSION, I HAVE WORKED CLOSELY WITH THE MEMBERS OF THE COMMISSION, AND IN PARTICULAR WITH CHAIRMAN THOMAS. I HAVE DEVELOPED AN EXCELLENT WORKING RELATIONSHIP WITH THE CHAIRMAN AND WITH ALL THE COMMISSIONERS. I KNOW THAT THEY ARE ALL PASSIONATELY COMMITTED TO THE EEOC'S MISSION, AND THAT THEY ALL RECOGNIZE THAT ENFORCEMENT LITIGATION IS CRITICAL TO THE COMMISSION'S SUCCESS. WITH YOUR CONSENT, I LOOK FORWARD TO CONTINUING TO WORK WITH THE COMMISSION, AS ITS GENERAL COUNSEL, AND WITH THIS COMMITTEE, TOWARD ACHIEVING THE GOAL WE ALL SHARE: A WORK ENVIRONMENT FREE FROM INVIDIOUS DISCRIMINATION.

AT THIS TIME I WOULD BE HAPPY TO ANSWER ANY QUESTIONS YOU MAY HAVE.

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STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: Zuckerman (LAST) Jeffrey (FIRST) Ira (OTHER)

Position to which nominated: General Counsel, Equal Employment Opportunity Commission Date of nomination: September 17, 1985

Date of birth: 15 (DAY) Jan. (MONTH) 1950 (YEAR) Place of birth: New York, New York

Marital status: married Full name of spouse: Miriam Emily Sternberg Zuckerman

Name and ages of children: Aron Meir (5) Lea Bayla (4) Yitzhak Chaim (2½) Eliezer Moshe (4 mos.)

Education:

Institution	Dates attended	Degrees received	Dates of degrees
Yale Law School	Sept. 1969 to June 1972	J.D.	June 1972
City College of New York	Sept. 1965 to June 1969	B.A.	June 1969
Bronx High School of Science	Sept. 1962 to June 1965		
Junior High School 44, Manhattan	Sept. 1960 to June 1962		
Hunter College Elementary School	Sept. 1957 to June 1960		
Public School 9, Manhattan	Sept. 1955 to June 1957		

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Board of Editors, Yale Law Journal

Phi Beta Kappa (City College of New York)

Shapiro Scholarship for outstanding pre-law student at CCNY

graduated CCNY cum laude, with Honors in Economics

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Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
See ADDENDUM.		

Employment record: List below all positions held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

June 1969 to Aug. 1969	Research Assistant, American Bankers Association, 90 Park Avenue, New York, New York 10016
June 1970 to Aug. 1970	Summer Intern, Office of the Secretary of Defense, The Pentagon, Washington, D.C. 20301
June 1971 to Aug. 1971	Summer Law Clerk, Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York, New York 10022
Apr. 1972 to May 1973	Law Clerk, Garvey, Colleran, Weiner & Levy, 7 Whitney Avenue, New Haven, Connecticut 06510
July 1972 to July 1973	Law Clerk to the Honorable Robert P. Anderson, Senior United States Circuit Judge, United States Court of Appeals for the Second Circuit, United States Courthouse, New York, New York 10007
Mar. 1974 to June 1981	Associate, Sullivan & Cromwell, 125 Broad Street, New York, New York 10004
June 1981 to Aug. 1984	Special Assistant to the Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Washington, D.C. 20530
Aug. 1984 to present	Chief of Staff, Office of the Chairman, U.S. Equal Employment Opportunity Commission, Washington, D.C.

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Government experience: List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments other than those listed above.

June 1966 to Aug. 1966 — Summer Clerk, U.S. Bureau of Customs, U.S. Customhouse, New York, New York 10004

June 1967 to July 1967 — Summer Clerk, U.S. Bureau of Customs, U.S. Customhouse, New York, New York 10004

July 1967 to Aug. 1967 — Summer Intern, Antitrust Division, U.S. Department of Justice, Washington, D.C. 20530

Published writings: List the titles, publishers and dates of books, articles, reports or other published materials you have written.

"'Preliminary Preliminary' Relief Against Anticompetitive Mergers," which was published in Volume 82, Number 1 of The Yale Law Journal (November 1972)

"Appeasement," which was published in The Campus, the undergraduate newspaper at CCNY, on May 16, 1969

Political affiliations and activities: List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last five years.

See ADDENDUM.

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No. The position for which I have been nominated is with the same agency as where I am presently employed.

2. State whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

No.

3. Has a commitment been made to you for employment after you leave Federal service?

No.

4. Do you intend to serve the full term for which you have been appointed or until the next Presidential election, whichever is applicable?

Yes.

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements or other continuing financial, business or professional dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

None

3. Describe any business relationship, dealing or financial transaction which you have had during the last five years whether for yourself, on behalf of a client, or acting as an agent that could create a potential conflict of interest in the position to which you

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3. Describe any business relationship, dealing or financial transaction which you have had during the last five years whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

I was an Associate at the law firm of Sullivan & Cromwell, and that firm may represent parties in litigation with the EEOC.

4. List any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any Federal legislation or of affecting the administration and execution of Federal law or policy.

None.

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

In order to avoid even the appearance of a conflict of interest, I would disqualify myself from participating in any matter in which Sullivan & Cromwell represented any party on or before June 1, 1981.

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ADDENDUM TO STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

Memberships (page 2)

Organization	Office Held (if any)	Dates
Academy of Political Science		1975-1982
American Academy of Political and Social Science		1978-1982
American Automobile Association		since 1982
American Bar Association		since 1973
Association of the Bar of the City of New York		since 1974
Be'er Hagolah Institutes, Inc.	director	1980-1981
The Broad Street Club		1979-1981
Bronx High School of Science Alumni Association		since 1965
City College of New York Alumni Association		since 1969
Desiree		since 1980
Jewish Advocates of the West Side	member of Steering Committee	1979-1981
The Jewish Center (New York)		since 1974
Jewish Lawyers Guild		1976-1981
Lincoln Square Institute of Jewish Studies	Director Chairman of the Board and President Treasurer	since 1977 since 1978 since 1980
Lincoln Square Synagogue		since 1977
Metropolitan Commission on Torah Education	member of Administrative Board director	1979-1981 1980-1981
New York County Lawyers Association		since 1973

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New York State Bar Association		since 1974
Parkland Pool Association		since 1985
Silver Spring Eruv Association	Vice President	since 1984
Silver Spring Jewish Center		since 1981
The Yale Club of New York City		1977-1981
Yale Law School Association of D.C.	member Vice President President	since 1981 1982-1983 1983-1984

Political affiliations and activities (page 3)

I have made the following contributions to political parties or election committees during the last five years:

Date	Recipient	Amount
September 30, 1980	National Republican Congressional Committee ("NRCC")	$ 25
January 25, 1981	NRCC	25
March 2, 1981	Republican National Committee ("RNC")	35
May 29, 1981	NRCC	25
September 21, 1981	NRCC	25
January 8, 1982	NRCC	25
April 7, 1983	NRCC	25
April 7, 1983	RNC	25
October 31, 1983	The Corcoran Committee	25
October 31, 1983	NRCC	10
October 31, 1983	People for Boschwitz	25
October 31, 1983	RNC	10
January 8, 1984	NRCC	10
January 8, 1984	RNC	10

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Date	Recipient	Amount
January 29, 1984	RNC	$ 25
March 1, 1984	RNC	100
March 12, 1984	Corcoran for Senate	100
March 19, 1984	NRCC	10
April 6, 1984	NRCC	10
April 20, 1984	RNC	35
May 7, 1984	NRCC	10
May 18, 1984	Corcoran for Senate	50
June 10, 1984	RNC	50
June 14, 1984	NRCC	10
June 17, 1984	RNC	10
June 21, 1984	New York State Republican Committee	100
July 24, 1984	RNC	10
August 5, 1984	GOPAC	10
August 5, 1984	NRCC	10
August 5, 1984	People for Boschwitz	10
August 29, 1984	NRCC	10
September 12, 1984	RNC	10
October 2, 1984	NRCC	5
October 8, 1984	NRCC	10
October 16, 1984	People for Boschwitz	10
October 22, 1984	RNC	10
October 26, 1984	Committee of Citizens for Decent Government	10
November 27, 1984	NRCC	10
December 17, 1984	RNC	50

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Date	Recipient	Amount
December 31, 1984	NRCC	$ 10
February 14, 1985	NRCC	10
February 14, 1985	Packwood for Senate	50
March 3, 1985	RNC	10
March 12, 1985	NRCC	10
March 17, 1985	NRCC	10
April 2, 1985	Citizens for Arlen Specter	25
April 2, 1985	RNC	10
May 9, 1985	GOPAC	10
May 10, 1985	RNC	50
May 23, 1985	NRCC	25
May 28, 1985	GOPAC	10
July 30, 1985	NRCC	10
July 30, 1985	RNC	10
August 11, 1985	Arlen Specter for U.S. Senate	25
August 18, 1985	GOPAC	20
August 29, 1985	RNC	25
September 13, 1985	RNC	10

Jeffrey F. Zuckerman
September 23, 1985

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The CHAIRMAN. Thank you, Mr. Zuckerman.

We have a vote on, and I have asked Senator Metzenbaum to go over and vote so he can come back, and we will just permit him to ask any questions that he has, and then I will run over and vote and try and get back as soon as I can.

Mr. ZUCKERMAN. I understand.

The CHAIRMAN. I think that is the way to orderly proceed. But let me just ask you one question.

As you know, this committee has previously criticized the General Counsel's office of the Equal Employment Opportunity Commission for its lack of productivity.

What steps have been taken, or what steps will you take to remedy this particular problem?

Mr. ZUCKERMAN. I think the first step that is being taken and that I would hope to continue is to increase the amount of work done by the attorneys within the office of General Counsel and within our field legal units. The way we are doing this and hope to continue doing this is by eliminating the old system of picking and choosing which instances of discrimination are worthy of litigation.

It is the present Commission's view, as stated in a policy statement adopted last September, a year ago September, and it is my view, that every instance of discrimination is litigation-worthy, and we intend to sue wherever we find discrimination occurring. By definition, I think this would increase the workload of our attorneys and their productivity.

I would also hope to work on other ways to increase their productivity. For example, I think there is still room for improvement in the training given to the attorneys at the EEOC. We could secure more training for them outside the Commission, for example at the National Institute of Trial Advocacy. And also within the Commission, we could pay more attention to having senior experienced lawyers train our new recruits and other, more junior lawyers.

I think it is also important to have the General Counsel and his staff monitor the progress made by our field attorneys in prosecuting the cases that are filed. It is not enough simply to file the cases. We have to make sure that they are being prosecuted.

The Commission might consider using other techniques in order to improve our lawyers' productivity. For example, we could adopt the practice of many law firms and other Government agencies of having lawyers keep detailed records on how they spend their time, in order to make sure that the most effective and efficient use of time is being made.

The CHAIRMAN. Thank you.

I think I am going to have to run, or I will miss this vote myself. What I am going to do, I have asked Senator Metzenbaum, the minute he gets back, to start asking his questions, but I want to reserve the right as chairman to be able to interrupt to finish my questions if I desire, so if staff would mention that to Senator Metzenbaum.

I will rush back as soon as I can.

With that, we will recess until Senator Metzenbaum gets here, and we will resume as soon as he gets here and have him start asking any questions he has.

Thank you, Mr. Zuckerman. I am sorry for these inconveniences.

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Mr. ZUCKERMAN. Thank you, Senator. I understand.

[Short recess.]

Senator METZENBAUM. The committee will come to order.

Mr. Zuckerman, in a memo you wrote to Chairman Thomas in December 1984—and that memo is identified as Document No. 4 of your committee submission—as I understand it, you took the position that eligibility for retirement is "a reasonable factor other than age"—and that is a quote, "reasonable factor other than age"—which, as you know, is a phrase that is particularly applicable in this situation, and in the law—and therefore, a valid defense in charges of age discrimination under the ADA—correct?

Mr. ZUCKERMAN. In the circumstances of that case, at least, yes, Senator.

Senator METZENBAUM. So the answer is yes, you did take that position?

Mr. ZUCKERMAN. Yes, sir.

Senator METZENBAUM. And in that same memo, did you recommend that the EEOC staff be directed to dismiss an action if the employer laid off or discharged employees based on their eligibility for retirement?

Mr. ZUCKERMAN. My recommendation was that the Chairman seek to have the Commission direct the staff to dismiss this case if, under the circumstances of this case, that was the reason for the action that the employer had taken.

This was a case where the employer, as I recall, was engaged in a rather massive layoff, and it was a question of which people should be—how the employer chose whom to lay off.

Senator METZENBAUM. Well, you said, "It seems to me that eligibility for retirement is a reasonable factor other than age," and then you go on to say, "It seems to me reasonable for a company that must lay off employees to do so in a way that minimizes the economic hardship upon those laid off by discharging first those who will receive retirement benefits."

You go on to say that, "Staff should be directed to dismiss the action if this turns out to be the case."

Correct?

Mr. ZUCKERMAN. Yes, sir.

Senator METZENBAUM. Now my question to you is—you are obviously pretty smart, the Yale Law School, J.D., 1972—how could you make such a recommendation when three Federal courts of appeals had issued four separate decisions, between September 1980 and January 1984, holding it was unlawful age discrimination to treat employees differently, based upon their eligibility for retirement?

Mr. ZUCKERMAN. That information—I do not recall if all three cases were cited—but understand, this is not all the information that was before the Chairman. My memorandum to the Chairman was building upon what was already before him.

Senator METZENBAUM. Pardon? I cannot hear you.

Mr. ZUCKERMAN. My memorandum to the Chairman was building upon what was already before him and had been prepared by others.

As I wrote in this memo, when you have a situation as occurs where an employer must face this, simply for economic reasons, is now about to make a massive layoff of employees at a plant—not a

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total closing, but a largescale layoff. If it is a unionized plant, the employer will often engage in some bargaining with the union, in order to try to figure out some way to minimize what is clearly going to be a disastrous effect upon the work force. In that situation, it seems to me that if an employer concludes that one of the ways he is going to try to make the best of what is, by definition, a terrible situation, that one of the ways he is going to try to minimize the economic impact on those laid off, is by laying off those who at least are assured, right from the outset, of some other means of support, then that seems to me to be a reasonable effort, a reasonable factor other than age, and that is not the arbitrary age discrimination that the statute says is what it is intended to eradicate.

Senator METZENBAUM. You think that what seems to you, which is the phrase that you used twice, is more important than telling the Chairman of the Commission what the law is?

Let me point out to you that in two of those cases, *Baltimore and Ohio Railway Company* and *City of Altoona,* they involved decisions by economically hardpressed employers to discharge employees based on their eligibility for retirement. Isn't that, Mr. Zuckerman, precisely the situation that we have in this case that was presented to Mr. Thomas?

Mr. ZUCKERMAN. I am not suggesting that what seems to me is by any means more important than the law. The relevant case law was already before the Chairman, because there were other memos before the Chairman in addition to my memo that you have before you.

Senator METZENBAUM. Show me the memos.

Mr. ZUCKERMAN. Those are not memos—pardon me, sir?

Senator METZENBAUM. Show me the memos where you told the Chairman—did you tell the Chairman that, "The law is the following, but it seems to me that you ought to go a different way," or did you tell the Chairman, "This is the law under *Baltimore and Ohio Railway, City of Altoona,* and in the *Westinghouse* case, but I think you ought to do something different"—did you do that?

Mr. ZUCKERMAN. The staff—our staff attorneys in the Office of General Counsel—prepare a memorandum on each case. Those memorandums discussed the relevant cases. When I write memos, I sometimes cite additional cases. In this case, however, there were no additional cases that I was seeking to call to the attention of the Chairman. But as a supplement to the work of the staff, I was simply calling the language of the statute to the Chairman's attention.

Senator METZENBAUM. Where did you say that? Show me that. I do not see anything in this memo. All I see is that you are saying, "Second, it seems to me that eligibility for retirement is a reasonable factor than age," and then later on, "It seems to me reasonable for a company that must lay off employees to do so in a way that minimizes economic hardship on those laid off by discharging first those who will receive retirement benefits."

I am saying you are a lawyer——

Mr. ZUCKERMAN. Yes, sir.

Senator METZENBAUM [continuing]. And obviously, a well-trained lawyer. What I do not understand is how you as a lawyer, advising

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Mr. Thomas, did not put upfront to him and say, "The law is the following. In the case of *Baltimore and Ohio Railway,* the court said this. And in the case of *City of Altoona,* the court said this. And in the case of *Westinghouse,* the court stated eligibility for early retirement is too closely related to age to be given credence as a valid justification."

In view of those three cases, how in the world, how in the world could you say, "It seems to me that you ought to take that into consideration"?

Mr. ZUCKERMAN. The case law was already before the Chairman and before the Commission——

Senator METZENBAUM. Show me where. How do I know that. You say that. How do I know that? Do you say in this memo anywhere, "You already have before you a brief with respect to case law"? Show me where it is before the Chairman. What is your evidence?

Mr. ZUCKERMAN. Well, sir, in every case, in every case of proposed litigation, what goes to the Chairman and all the Commissioners is a memorandum prepared by the legal staff in the district office, and a memorandum prepared by the Office of General Counsel. In the memorandum that I then would prepare for the Chairman, I would not repeat the full analysis set out in the staff legal memorandums. What I would try to do would be to provide some sort of additional information, some additional insight, if there were anything additional to provide. In this case, I felt it was important for the Chairman to look back at the text of the statute, which refers to reasonable factors other than age. I was then suggesting an analysis of why, under the circumstances, the company's action might have been based upon reasonable factor other than age. I think we would all agree that the company may have been faced with a disaster for some large part of its work force, and may have been trying to make the best of an impossible-to-make-good situation. And on that basis, I was suggesting to the Chairman that it seemed to me that under those circumstances, this is a reasonable factor other than age.

He was aware of the case law on the subject through these other memorandums. It therefore was not necessary for me to discuss the case law in my memo.

Senator METZENBAUM. Isn't it a fact, Mr. Zuckerman, that in the *Baltimore and Ohio Railway* case and the *City of Altoona* case, you also had economically hardpressed employers; and isn't it also the fact that on all four of the cases, those cases were brought by the EEOC, and they were successfully prosecuted in the courts of appeals; and yet you come to Thomas and say to him, "It seems to me that retirement is a consideration, or that eligibility for retirement is a consideration to be taken into account"?

I do not understand you as a lawyer. I do not understand you. I am a lawyer. I read the law, and I think as a lawyer, I have an obligation to advise my client what the law is.

In this matter, you advised your client without at all disclosing to him in your letter or your memo, without at all disclosing to him what the law is, what seemed to you to be a way to handle the matter notwithstanding the fact that the law was 180 degrees in the opposite direction?

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Mr. ZUCKERMAN. As I say, the Chairman, who is also a fine lawyer, had before him the full legal analysis of the staff, recommending litigation.

Senator METZENBAUM. Did he have the briefing with respect to those cases?

Mr. ZUCKERMAN. He had before him full memorandums discussing the relevant cases.

Senator METZENBAUM. Who made that memorandum?

Mr. ZUCKERMAN. There were memorandums from the regional attorney and from the General Counsel.

Senator METZENBAUM. And they all recommended going forward, didn't they?

Mr. ZUCKERMAN. Yes; I too, recommended that he vote to authorize the lawsuit.

Senator METZENBAUM. Did you check—did you not also say that it should be dismissed—in fact, you say you voted to authorize it. Let me read you your language.

It seems to me reasonable for a company that must lay off employees to do so in a way that minimizes the economic hardships upon those laid off by discharging first those who will receive retirement benefits. It does not, at least not in the materials attached at the end, contend that the layoff decisions were based upon eligibility for retirement, but the staff should be directed to dismiss the action if this turns out to be the case.

Now you say you recommended to go forward, but this says if that is the fact—and you knew it was the fact—then you are saying that staff should be directed to dismiss the case.

The CHAIRMAN. Excuse me, Mr. Zuckerman.

Senator Metzenbaum, why don't you continue questioning. I will run over and vote and come back, and then I will try to keep going while you are voting.

Senator METZENBAUM. Fine, OK.

The CHAIRMAN. OK.

Mr. ZUCKERMAN. Senator, what I was referring to is, of course, the opening of the memorandum in which I say, "I recommend that you vote to authorize this lawsuit, but with two caveats to the General Counsel."

Based upon the facts that we had, it appeared that this was a plain, cold case of people being selected for discharge on the basis of their age. That is a violation of the statute, and therefore, I recommended to the Chairman that he vote to authorize this lawsuit. This was the same as the recommendations of the General Counsel and of the regional attorney.

We all agreed that the lawsuit should be authorized.

Senator METZENBAUM. But you say that then, with those two caveats, in one of them you say—and based upon the facts—that it should be dismissed.

Mr. ZUCKERMAN. I said that if the facts should turn out a certain way. The facts we had did not show that that was the basis. I suspect there was something in the presentation package that led me to consider whether pension eligibility might have been the basis. But on the facts that we had, my recommendation was to authorize the lawsuit.

Senator METZENBAUM. Shouldn't it concern this committee that your caveat, which talks about dismissal—not talks about, but di-

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rects, urges the dismissal—squarely conflicts with the position which the EEOC had consistently and successfully taken in the past?

You are really saying that if there is eligibility for retirement, then they should be directed to dismiss the case. But there was eligibility for retirement, and yet the courts have said that was not a sufficient basis on which to dismiss. The courts said that that was not a valid basis to discriminate against an employee. And yet you are saying here that if that is the case, then the action should be dismissed.

Mr. ZUCKERMAN. It seems to me that the Commission is to apply its experience, its expertise in the area, to make the best judgment on these legal questions that it can. To the extent that it may come to the conclusion that it has taken a wrong position in the past——

Senator METZENBAUM. A "wrong position" in the past?

Mr. ZUCKERMAN. If it comes to that conclusion, then the Commission can change its position.

Senator METZENBAUM. Even if the courts have said what the law is, the Commission should change its position?

Mr. ZUCKERMAN. It depends what courts. It depends——

Senator METZENBAUM. Oh; now, tell me about that. Tell me which courts you like and which ones you don't. You don't like the Circuit Court of Appeals that handled the *Westinghouse* case, or the circuit court of appeals that handled the *Baltimore and Ohio* case and the *City of Altoona* case? Those were decided by the fourth circuit in *Baltimore and Ohio,* the third circuit in the *City of Altoona,* the ninth circuit in EEOC against Bordens, and the third circuit in the *Westinghouse* case.

Now, which courts do you like?

Mr. ZUCKERMAN. I like and I respect all courts.

Senator METZENBAUM. That is nice of you.

Mr. ZUCKERMAN. In terms of law, what the Supreme Court says is the law is the law, of the land. How the Supreme Court interprets the law is the controlling interpretation of the law. That interpretation stands throughout this country, unless and until either the Congress changes the law or the Supreme Court changes its interpretation.

With respect to courts of appeals, however, what a court of appeals says is the law is similarly the law——

Senator METZENBAUM. What is that?

Mr. ZUCKERMAN. What a court of appeals says is the law is similarly the law within that circuit, unless and until, again, either this body changes it——

Senator METZENBAUM. Do you mean to say that when the fourth circuit or the third or the sixth rules, that that is not the law of this land until it is reversed or distinguished or in some way changed? Are you saying to me that that is only the law for that circuit?

Mr. ZUCKERMAN. Frequently, Senator, there are differences between the circuits on questions of law.

Senator METZENBAUM. But we do not have that here, do we?

Mr. ZUCKERMAN. Where the EEOC has taken a position, the Commission may rethink its position on the basis of its experience and accumulated expertise.

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Senator METZENBAUM. Is this "Zuckerman on law"? Are you suggesting that the administration position is that the decisions of the courts should be reversed in an area where the law and the EEOC had been settled for years? Are you saying to us that the Commission should take another look because it has not been decided in the first and the second and the fifth and the sixth, but it is only the third, fourth, and the ninth? Is that what you are saying—and, because the Supreme Court has not ruled on it? Is that "Zuckerman on law"?

Mr. ZUCKERMAN. I would say, Senator, that it is always profitable for the EEOC to be thinking about the positions it is taking and has been taking. The Commission should always make sure that its positions that it is taking are consistent with the law, and consistent with the goals underlying the law. I would urge the Commission always to be thinking about its positions.

Senator METZENBAUM. Always, just sort of take a look and not worry about what the courts have decided, particularly if you do not like that particular circuit court of appeals, then "Zuckerman on law" says that the Commission ought to take another look, and besides, "Zuckerman on law" says that it is only the law in that particular district. And I want to ask you—you were a good law student—I want to ask you to give me one case, one place where that has ever been stated by the courts, that what one circuit said is not the law of this land until all the circuits or the Supreme Courts have decided.

I just think you are so far off-the-wall on this point, legally—I am not now talking about your attitude toward enforcement; I am talking to you about what is the law of this land and whether or not you deserve to be General Counsel on the basis that you think it is only the law in that particular circuit court of appeals.

I cannot believe you said that.

Mr. ZUCKERMAN. The law is what Congress enacts. That is the law. Sometimes there are questions about what the law means. Sometimes there are differences of opinion between courts as to what the law means.

Senator METZENBAUM. Do we have that here?

Mr. ZUCKERMAN. In this particular——

Senator METZENBAUM. A difference of opinion between courts. There are no other circuit courts of appeals decisions that differ.

Mr. ZUCKERMAN. I am not aware of any.

Senator METZENBAUM. That is right. So therefore, three circuit courts of appeals have come to one conclusion as to what the law is—there is an adorable little girl right next to you who would like your attention——

Mr. ZUCKERMAN. That is one of my sons, Senator.

Senator METZENBAUM [continuing]. So what you are saying is three circuit courts of appeals have ruled as to what the law is. And you have said to us two things this morning. One is that that is not necessarily the law just because they said it in one district; there might be other opinions. And you have also said that the EEOC might take a look and come to a contrary conclusion. And I am concerned about now—first, I was concerned about your attitude toward the law and your attitude toward the enforcement of EEOC. Now I am concerned about you as a lawyer, because you

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have now advanced some concepts that I cannot believe that I have heard you say. And that is that it is not necessarily the law because one circuit court of appeals says it is the law. It so happens in this case we have three circuit courts of appeals, but whatever. And the second thing is that the EEOC is also in a position, notwithstanding those interpretations of the law, to go off on their own and spell out the law as they think it should be or could be, or they would like it to be.

Mr. ZUCKERMAN. The law is what is enacted by the Congress. That is the law.

Senator METZENBAUM. Right. We agree on that.

Mr. ZUCKERMAN. The EEOC has the obligation with respect to the laws that it enforces to do its best to enforce those laws, to understand those laws, to interpret those laws. And the interpretations of the EEOC with respect to those laws are generally given a certain deal of deference by the courts.

That obligation is constant with the EEOC, to do its best to enforce these laws. There will be times when the EEOC, when the Commission, will disagree with a court's interpretation of the law. That has happened in the past; I am sure it will happen again in the future.

One of the considerations that the EEOC always must take into consideration in interpreting the law is what the courts have done and what the courts have said.

Senator METZENBAUM. "Must take into consideration" what the courts have—you do not believe that they are bound by what the courts have said, have held?

Mr. ZUCKERMAN. The Commission is bound by the law—by the interpretations of the courts to the extent of those courts——

Senator METZENBAUM. "To the extent of those courts"—only if you are in that district.

I must go to vote, but I must tell you that I am absolutely shocked by your testimony.

I will be back.

[Short recess.]

The CHAIRMAN. While we are waiting for Senator Metzenbaum to come back, I understand that he has raised three circuit court opinions that differ from the opinion that you wrote to the Chairman.

I suppose that the thrust of his arguments, although I have not been here, has been that once three circuit courts rule, that that should be the law of the land.

What is your opinion on that? I have mine, but I would like to know what yours is. And why would you differ with three circuit courts of appeal, if that is the law of the land?

Mr. ZUCKERMAN. The law of the land is the statute enacted by Congress.

The CHAIRMAN. OK.

Mr. ZUCKERMAN. The courts have their obligation and responsibility to interpret the law. The Commission has its obligation and responsibility to interpret the laws that we enforce. There have been disagreements in the past. There will be disagreements in the future.

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It is my understanding that even where three circuit courts may agree on a position does not make that necessarily the correct interpretation.

The CHAIRMAN. Or the binding law of the land for every other circuit.

Mr. ZUCKERMAN. That is right, Senator.

The CHAIRMAN. Or even the binding law of the land for the land itself.

Are any of these cases being appealed to the Supreme Court?

Mr. ZUCKERMAN. I do not know.

The CHAIRMAN. You see, I do not want Utah to be bound by the law of Ohio or its circuit court of appeals, nor do I want the Supreme Court to be foreclosed from its ultimate responsibility to decide what is the law. Nor do I want you as a counsel at the EEOC to be foreclosed from arguing to the last degree what you believe to be the actual state of the law as you interpret the statute, which really is the law.

Now, I think it is almost ludicrous to argue that just because three circuits out of—how many circuits are there?

Mr. ZUCKERMAN. Twelve.

The CHAIRMAN. There are more than that. There are 12 circuits plus the Federal——

Mr. ZUCKERMAN. The Federal circuit.

The CHAIRMAN. So there are 13 circuit courts of appeals. And we have all kinds of intercircuit court of appeals rivalry and difficulties and conflicts and differences over the law.

Now, I presume if you agreed with those three circuit courts of appeals, you would have recommended to the Chairman exactly what they said.

Mr. ZUCKERMAN. Absolutely.

The CHAIRMAN. But you do not agree with them—or, do you?

Mr. ZUCKERMAN. No, I did not agree with their analysis of what is a reasonable factor other than age in these circumstances.

The CHAIRMAN. Well, what is the responsibility of Counsel when you do not agree with the courts who are not the ultimate courts, but nevertheless, the highest at that particular time—what is your responsibility with regard to interpreting the actual law of the land?

Mr. ZUCKERMAN. I think——

The CHAIRMAN. And are you precluded from exercising your own independent judgment with regard to what that law says?

Mr. ZUCKERMAN. I think the Commission continues to have the obligation to make its own independent judgments. If we were to file a brief in one of the other circuits, I think we would have the obligation to inform the court of the position that other courts had taken contrary to the position we were advocating. But we retain the responsibility and the obligation to advocate the position with which we agree.

In fact, Mr. Chairman, a similar situation arose shortly after I arrived at the Commission. All over the country, defendants were challenging the authority of the EEOC to enforce the Age Discrimination in Employment Act, claiming that the Reorganization Plan No. 1 of 1978, which transferred enforcement authority to the EEOC from the Department of Labor, was unconstitutional because

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of certain congressional veto provisions within the enabling legislation.

Shortly after I arrived at the EEOC, the second circuit held that transfer of authority was unconstitutional, and that we had no authority to enforce the Age Discrimination in Employment Act.

Within the second circuit, that certainly was the rule of law, but we secured from the second circuit agreement that cases pending in the second circuit would not be dismissed pending our being able to go to the Supreme Court and seek review.

But everywhere in this country outside the second circuit, we continued to prosecute Age Act cases, to bring new cases and to prosecute those that were pending, and to assert the position in briefs and in oral arguments that there was nothing unconstitutional about the transfer of authority.

In all those situations, to the best of my knowledge, we fulfilled our obligation as officers of the court, to inform the court of the contrary second circuit decision.

However, notwithstanding that second circuit decision, we continued to assert the authority of the Commission to enforce the Age Act everywhere outside the second circuit.

The CHAIRMAN. Thank you.

Let me turn to Senator Dodd at this point, if he would care to ask any questions.

Senator DODD. Well, Mr. Chairman, I do have some, and I have a statement[1] as well for the record. And maybe it might——

The CHAIRMAN. We will put the statement in the record, at the front of the record, at the appropriate place.

Senator DODD. Thank you.

The CHAIRMAN. Without objection.

Senator DODD. If some of these questions have been asked of you, Mr. Zuckerman, then just tell me so, and I will go to the record; I apologize. As you may know already, we are racing back and forth with votes this morning.

Mr. ZUCKERMAN. I understand, Senator.

Senator DODD. In the Equal Opportunity Commission's regulations under the ADEA, the Commission recognizes the disparate impact theory of discrimination as a viable means of proving violations of that piece of legislation—that is, the ADEA.

The regulation embodying the Commission's decision concerning the applicability of disparate impact to the ADEA is contained in 29 CFR.

Are you in agreement, the first question I have for you, with the legality of that interpretive provision? Are you familiar with it, first of all?

Mr. ZUCKERMAN. I question—I have serious reservations about whether adverse impact in and of itself should be enough to establish a violation of the Age Discrimination in Employment Act in all circumstances.

Senator DODD. You do not question the legality of it, but you question the wisdom of it?

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[1] The statement referred to was not received for the record.

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Mr. ZUCKERMAN. No. I question whether that is a proper interpretation of the Age Discrimination in Employment Act.

Senator DODD. In a variety of cases as well as the above-referenced regulations, the Commission has supported the application of the theory of disparate impact. Good examples of the Commission's support of the disparate impact theory are contained in the Commission's amicus curiae brief in *Leftwich* v. *Harris Stowe State College* and the position taken by the EEOC in *EEOC* v. *Borden's, Inc.*

Are you familiar with those cases?

Mr. ZUCKERMAN. I am familiar with the *Borden's* case.

Senator DODD. Well, would you comment on the Commission's position in the amicus curiae—just in that case, if you would?

Mr. ZUCKERMAN. You see, the question again here centers around section 4(f)(1) of the Age Discrimination in Employment Act, which says that—"It shall not be unlawful for an employer to take any action otherwise prohibited where the differentiation is based on reasonable statutes other than age."

By definition in an adverse impact situation, what they are saying is that a differentiation is based on some factor other than age, but is having an adverse impact upon people within the protected age group.

Senator DODD. Right.

Mr. ZUCKERMAN. If a factor other than age is the basis for the differentiation, and if that factor other than age is reasonable, then it would seem to fall within the permissive language of section 4(f)(1) of the statute. That is why I would question whether in all circumstances, everything that has an adverse impact would violate the Age Discrimination in Employment Act.

Senator DODD. I presume, given that statement, you would agree that there are a variety of circumstances in which the disparate standards or tests or whatever would in fact violate those regulations and those provisions?

Mr. ZUCKERMAN. The statute talks about "reasonable factors other than age," and the use of the word "reasonable," suggests that we must consider the reasonableness of any factor that has an adverse impact.

The statute itself states that its purpose is to proscribe arbitrary age discrimination. Courts have pointed out that a touchstone of this statute is whether employers are acting arbitrarily.

Senator DODD. That is correct. There is a whole body of case law that has developed around this which has applied disparate impact to the ADEA. I gather what you are saying is that in some of those cases, you have agreed with the court decisions because the standard has been a reasonable one; and in others, you have not.

Or am I misinterpreting what you are saying? Do you think as a general proposition that those decisions have been wrong?

Mr. ZUCKERMAN. As I recall, the second circuit applied a pure disparate impact approach. But as I recall in that case, the court did not really go into an analysis of the situation. Rather, the court just took the disparate impact analysis as it applies under Title VII, and applied it under the Age Act.

There have not been many court cases discussing this particular issue. Recently, there was a district court decision, in a case brought by the EEOC, which discussed the disparate impact issue

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in some detail. The court concluded, notwithstanding a number of indications in the legislative history that the Age Act was only intended to cover intentional discrimination, that the adverse impact approach was applicable.

Senator DODD. Well, you may be familiar with a memorandum from the Acting General Counsel, Mr. Butler, of April 1985, that recommended that the Commission institute litigation against the Nichols Department Store for violations of ADEA. Are you familiar with that memorandum?

Mr. ZUCKERMAN. Not off the top of my head, Senator.

Senator DODD. I tell you what I would like to do. You said you were familiar with the *Leftwich* case—or the *Borden* case—I forget which.

Mr. ZUCKERMAN. The *Borden* case.

Senator DODD. The *Borden* case. I would ask you to take a look at the *Leftwich* case and this memorandum on the Nichols Department Store violations. I presume in your response to the other questions, you would not have a response that would be substantially different to these two particular situations, I do not mean to try and spring things on you. I was not sure you would be aware of these particular matters.

Senator METZENBAUM. Senator Dodd, could I just cut in for one second?

Senator DODD. Certainly.

Senator METZENBAUM. Mr. Chairman, I have a number of other questions—quite a few—and the time is approaching when I know you are going to be adjourning. I am going to excuse myself at the moment, because I have an appointment at 11:55. But I would like to request Mr. Zuckerman be brought back next week, if we are in session, or whatever other time is convenient for the Chairman.

The CHAIRMAN. It is my understanding that you would object, even if we could, that you would object to a poll-out of Mr. Zuckerman——

Senator METZENBAUM. Oh, yes.

The CHAIRMAN [continuing]. And you would object on the floor to his confirmation at this time.

Senator METZENBAUM. Oh—I just have so many more questions. I have only begun my line of inquiry.

The CHAIRMAN. Well, this is our problem, Mr. Zuckerman. We are running out of time, and both of us have to be to a closed, secret meeting at 2 o'clock. I was going to recess until 2 o'clock.

How much longer will you be, Chris?

Senator DODD. That was it. I was just going to finish. I would ask you on the *Leftwich* case, and I will see that you get a copy if you do not have one, about the memorandum from Mr. Butler regarding the *Nichols Department Store* case, and I would appreciate your comments on those two matters. I presume you can get ahold of the *Leftwich* case on your own.

Mr. ZUCKERMAN. I am pretty sure I can get hold of a copy of that, and of Mr. Butler's memorandum, also.

Senator DODD. I would appreciate that.

Mr. Chairman, that was really all I had at this point.

The CHAIRMAN. Thank you, Senator Dodd.

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Mr. Zuckerman, I think what we will do is reschedule this hearing so that Senator Metzenbaum will have enough time to ask his questions.

I feel that you have been very candid with the committee. There is no question about your ability; I do not think anybody doubts that. And if they do, I would be surprised. There is no question about your educational standards; they are the highest imagineable.

And I have personal interest in your being confirmed here, because I believe you are a very fine man who is doing a fine job, to the best of your ability. And whether or not any member of this committee disagrees with you on any particular case I think is somewhat irrelevant. They can bring that out, and they can disagree and say whatever they want to, but you have a right as a thinking individual in this position to do and fulfill this job as you feel responsible to do—and I know you will.

So I apologize to you that we were unable to finish today. We wanted to start at 9, but Senator Kennedy suggested that he could not be here until 10:30, and so we set it for 10:30, and we did not quite have enough time to get this done.

So I apologize to you for having to bring you back, but I think that since this is a confirmation position, we probably should do so.

Senator Pell is here. Maybe we can ask Senator Pell if he has any questions at this time.

Senator PELL. No particular questions at this time. I am just very glad indeed that this hearing is being held, and also that it is being held over, because I think each of the members should have the opportunity to ask all the questions that they feel should be asked.

The CHAIRMAN. I think so.

Senator PELL. I realize this is a very controversial nomination and congratulate the Chairman on the style in which he is holding the hearing.

The CHAIRMAN. Thank you, Senator Pell.

I will reschedule this nomination hearing for the earliest possible convenience and will ask the Senators, especially Senator Metzenbaum, and anybody else who has questions, to cooperate and be here so that we can conclude this hearing when we next convene. And I intend to begin earlier in the morning so that we will have enough time to conclude the hearing.

But until then, I apologize to you, Mr. Zuckerman. I do not know anything else to do under the circumstances. We will have you come back, and I will surely try to be here, and we will try to get it resolved.

Thank you for being with us today, and I want to thank your family for being with you as well.

Mr. ZUCKERMAN. Thank you, Mr. Chairman.

The CHAIRMAN. With that, we will recess until further notice.

[Whereupon, at 11:50 a. m., the committee was adjourned.]

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NOMINATION

TUESDAY, MARCH 4, 1986

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in room SD-430, Dirksen Senate Office Building, Senator Orrin Hatch (chairman) presiding.

Present: Senators Hatch, Kennedy, Metzenbaum, Simon, Hawkins, Grassley, Stafford, Nickles, Quayle, Pell, and Kerry.

The CHAIRMAN. Today we are reconvening to consider the nomination of Jeffrey Ira Zuckerman to be general counsel of the Equal Employment Opportunity Commission.

An earlier hearing on the nominee was held on December 10, 1985, but due to a shortage of time, we were unable to act on Mr. Zuckerman's nomination prior to the end of the session. It is my hope that we can complete our questioning of Mr. Zuckerman this morning.

We would like to welcome you back to the lion's den, Mr. Zuckerman. I personally want to thank you for your help and your cooperation, your patience, and your forthrightness with this committee.

While some of my colleagues may disagree with you on how best to enforce the law, I believe I am speaking on behalf of the whole committee when I applaud your willingness to provide committee members with all the information that they have requested of you.

I believe your actions speak volumes about your character, and, I think, that is very important.

Now, before we begin, I would like to make one comment about procedure. A memorandum of understanding has been reached concerning the handling of confidential reports and documents received by the committee in connection with this nomination. According to that memorandum, during the hearing we will not refer to the covered documents by name or include them in the record. But if it is necessary to quote from or reference a document, it will be referred to by its assigned number.

Upon completion of the nomination process, all copies of the documents will be returned to the Equal Employment Opportunity Commission.

As I noted at the outset, it is my hope that we will be able to complete the questioning of Mr. Zuckerman today and that the committee will act on his nomination in an expeditious manner.

Let me first ask Senator Metzenbaum if he has an opening statement.

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Senator METZENBAUM. No opening statement, Mr. Chairman.
The CHAIRMAN. Senator Kennedy, do you have a statement?
Senator KENNEDY. Thank you, Mr. Chairman.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. In 1972, Congress recognized that the equal employment laws of the Civil Rights Act were ineffectively enforced, and in that year we granted the Equal Employment Opportunity Commission new and far-reaching powers to enforce title VII of the act. We created the Office of General Counsel of the EEOC, the Nation's chief enforcement officer for equal employment opportunity. The law creating that office specifically required the advice and consent of the Senate for appointees to the position to which Mr. Zuckerman has been nominated. We did so because it is a job of vast significance to the working men and women of this country, black and white, young and old, men and women.

A recent study by Dr. Jonathan Leonard has demonstrated that title VII and affirmative action have played a significant role in increasing black employment. In fact, after examining more than the 1,700 class action lawsuits, Dr. Leonard concludes that litigation under title VII of the Civil Rights Act of 1964 has had an even greater impact than affirmative action. The principal custodian of this essential weapon is the general counsel of the Equal Employment Opportunity Commission, and we must not entrust its wise and diligent use lightly.

The Office is more. It includes the duty to enforce the Age Discrimination in Employment Act—legislation that is vitally important to older workers. And the ADEA has no kind words for age discrimination. Age discrimination is wrong, and it is the duty of the general counsel of the EEOC to bring to bear the voice and the authority of the Federal Government to stop it.

And the Office is more. It includes responsibility for the enforcement of the Equal Pay Act. "The right to work," wrote Justice Douglas, "is the most precious liberty that man possesses." He was half right. It is women's precious liberty, too. And the act requires equal pay for equal work. There could be no badge of subjugation more scarlet than a paycheck from which money has been taken because its recipient is a woman. And in signing the Equal Pay Act into law, President Kennedy said that,

> By forbidding arbitrary discrimination against women in the payment of wages, the act added to our laws a structure basic to democracy, that women should have the same rights in the workplace that they have in the voting booth.

I am sure that Mr. Zuckerman appreciates the importance of the office he seeks and the reasons why the Senate must carefully examine his record and views, and I welcome the opportunity to do so today.

The CHAIRMAN. Thank you, Senator Kennedy.
Senator Simon, do you have any comments?
Senator SIMON. No, I do not. Thank you.
We will insert a statement by Senator Grassley at this point.
[Opening statement of Senator Grassley follows:]

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OPENING STATEMENT OF SENATOR GRASSLEY ON MARCH 4, 1986

Senator GRASSLEY. Mr. Chairman, the general counsel of the Equal Employment Opportunity Commission is responsible for directing the staff attorneys of the EEOC, for making sure the mandate of the Commission is reflected in the work of the staff attorneys.

The position of general counsel is very important because the work of the EEOC is very important. The purposes of the EEOC are to eliminate discrimination based on race, color, religion, sex, national origin, or age in hiring, promoting, firing, wages, testing, training, apprenticeship, and all other conditions of employment. The Commission also promotes voluntary action programs by employers, unions, and community organizations to make equal employment opportunity an actuality. The EEOC is also responsible for all compliance and enforcement activities relating to equal employment opportunity among federal employees and applicants, including discrimination against handicapped individuals.

In other words, Mr. Chairman, the EEOC has a broad mandate to assure that all Americans have an equal right to be considered for a job based solely on their qualifications for that job. The General Counsel plays an important role in seeing that the EEOC carries out its mandate.

I do not take this nomination lightly. I expect that the nominee will demonstrate a firm commitment to eliminating all unlawful forms of discrimination from the workplace.

I will examine the results of today's hearing, the nominee's answers to the extensive and detailed questions that I expect will be put to him. I will make my decision on whether or not to support the nominee based on his commitment to assuring equal employment opportunity to all Americans and securing redress for those to whom it has been denied.

Mr. Chairman, at the appropriate time I do have some questions to ask the nominee about the issue of whether or not to require employers to continue to accrue pension benefits to those employees who work past age 65. I have introduced legislation to reverse the current interpretation of the Age Discrimination in Employment Act tht allows employers to halt accrual of pension benefits at age 65. Since the EEOC has also considered this matter, I would like to ask Mr. Zuckerman a few questions about the issue.

The CHAIRMAN. All right. Let me begin, Mr. Zuckerman, with just a few questions. During the last hearing, there was much discussion of your position that eligibility for retirement is, quote, "a reasonable factor other than age," which was addressed in Committee Document No. 4. Lost in the debate was the fact that in Document No. 4, you urged the Commission to authorize litigation, and you felt there was ample evidence indicating that the plaintiff was the victim of age discrimination; that there was no need to base the case on the issue that eligibility for retirement is a reasonable factor other than age.

Is that basically a fair statement, and is that correct?

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STATEMENT OF JEFFREY IRA ZUCKERMAN, NOMINATED TO BE GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. ZUCKERMAN. Yes, Mr. Chairman, that is correct.

After the hearing, I went back and looked at the two underlying documents that had been available to the chairman. Those documents have also been made available to the committee staff, and a copy of one of them was given to the committee staff after they had reviewed them both. Looking there, I saw that what was involved in that case were three instances where a company had simply discharged people on the basis of their age, keeping people who were younger. This is a clear, patent violation of the Age Discrimination in Employment Act. That is why I recommended litigation in that case, and if I were general counsel, I would recommend to the entire Commission the institution of litigation wherever that sort of behavior occurred. It was precisely the behavior that the Congress intended to prohibit and prohibited in enacting the Age Discrimination in Employment Act.

The CHAIRMAN. OK. There has been much press over the Commission's reluctance to enter into settlement agreements or to pursue remedies calling for goals and timetables.

As general counsel, how do you intend to remedy discrimination?

Mr. ZUCKERMAN. In any case, I would seek a combination of make whole relief, of affirmative relief and of other injunctive relief. Specifically, No. 1, is that every individual who has suffered discrimination at the hands of the defendant should be made whole—should be put in the place that they would have been in but for the discrimination. They should be getting the back pay they would have earned if they had not suffered the discrimination. They should get the job they would have been in, whether a new job, or a promotion or a transfer, but for the discrimination. They should get whatever else they would have had but for the discrimination. They should get the training that they would have had but for the discrimination. They should have all the other opportunities that they would have had but for the discrimination.

As best as we possibly can, we should try to get every person to be as closely as possible in the situation that person would have been in but for the discrimination. That is the make whole part of the relief.

Second, we should require some affirmative action by the defendant. The affirmative action should have two goals: First, to remedy, to clear, to cure whatever was the past practice or situation that gave rise to the discrimination. If it was some particular practice of the employer that was the discriminating act, that act should be eliminated. If it is a person who is the problem—and basically, when we talk about a corporation discriminating, it is not the walls of a building or something like that; it is people who discriminate—the employer should be required to deal with that person.

Whatever it is that was causing the discrimination should be eliminated. The employer should also be required, to the extent appropriate in the context of that particular employer, to set in place a system to avoid future discrimination. Depending upon the size and nature of the employer, perhaps it should be required to set up

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an EEO complaint system, so that in the future, it will be able to deal effectively with these kinds of problems on its own, so that we do not have to go after it again.

I would add that I would have no hesitation about going after the employer again if it failed to live up to its responsibilities under the law.

Also, where appropriate, the Commission should require the employer to take some sort of affirmative action beyond these almost basic compliance efforts. The employer should be required to go beyond basic compliance with the statute, and to take affirmative steps to create opportunities, and to assure knowledge of opportunities, for those whom it has excluded in the past. If it is a particular group or groups that have been excluded in the past, this employer should be required to go out to the communities, to the places where those people live, to the places where those people go to look for information about jobs, and should be required to go out there and give information about the job opportunities available.

In appropriate circumstances, the employer can be required to set up a training program to provide training opportunities for those in our society who have been denied opportunity in the past. They can be required to provide educational programs for those who have been denied educational opportunities in the past.

I would also say a key element in any type of relief is also a general injunction against future discrimination and future violation of the act, coupled with a provision that would allow the EEOC to go in and check the records of the employer. Such a provision should specify the records to be kept, and give us the right to go in and check those records, and to talk to the employees, managers, and officers of the employer. After we secure an injunction, it is not enough to put it on the shelf. We need to be able to go back into that company, whether it is 1 year later or 2 years later, and look at what they have been doing since that injunction was entered.

And if we find at that future time that they have discriminated again, then they will have violated at that point not only the statute, but also an order of the court. At that point we should go after them with the full power of contempt, as contemplated by this Congress when it enacted title XI of the 1964 act, and as contemplated by the common law power of contempt. We should go after them with the full power of contempt, including where appropriate criminal sanctions for contempt of court.

That is my idea of the kind of relief we should seek, and the way to enforce these statutes.

[The prepared statement of Mr. Zuckerman follows:]

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STATEMENT OF JEFFREY I. ZUCKERMAN

NOMINEE FOR GENERAL COUNSEL

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DECEMBER 10, 1985

GOOD MORNING MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. IT IS AN HONOR AND A PRIVILEGE TO APPEAR BEFORE YOU TODAY AS YOU CONSIDER MY NOMINATION TO SERVE AS GENERAL COUNSEL OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. FOR THE PAST SIXTEEN MONTHS, AS CHIEF OF STAFF IN THE OFFICE OF THE CHAIRMAN OF THE COMMISSION, I HAVE HAD THE OPPORTUNITY TO WORK WITH CHAIRMAN THOMAS AND THE OTHER COMMISSIONERS TOWARD ENHANCING THE EFFECTIVENESS OF THE COMMISSION IN COMBATING UNLAWFUL EMPLOYMENT DISCRIMINATION. I HOPE THAT YOU WILL PERMIT ME TO CONTINUE THIS WORK AS GENERAL COUNSEL OF THE COMMISSION.

SOME TWENTY YEARS AGO, WITH THE ENACTMENT OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, THIS COUNTRY ESTABLISHED AS A MATTER OF NATIONAL POLICY AND LAW THAT EMPLOYERS, EMPLOYMENT AGENCIES AND LABOR ORGANIZATIONS MAY NOT DISCRIMINATE ON THE BASIS OF RACE, COLOR, SEX, RELIGION OR NATIONAL ORIGIN. ONE YEAR EARLIER, THE EQUAL PAY ACT OF 1963 ESTABLISHED THAT MEN AND WOMEN MUST RECEIVE EQUAL PAY FOR EQUAL WORK. THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 MADE AGE AN UNACCEPTABLE AND UNLAWFUL BASIS FOR EMPLOYMENT DISCRIMINATION. AND THE REHABILITATION ACT OF 1973 PROHIBITS FEDERAL AGENCIES FROM DISCRIMINATING AGAINST HANDICAPPED INDIVIDUALS, AND REQUIRES

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THE AGENCIES TO MEET THE SPECIAL NEEDS OF HANDICAPPED EMPLOYEES.

THESE STATUTES SHARE A COMMON PURPOSE: IN THE WORKPLACE, PEOPLE SHOULD BE JUDGED ON THE BASIS OF WHAT THEY CAN DO, NOT ON THE BASIS OF IRRELEVANT PERSONAL CHARACTERISTICS. THE MISSION OF THE EEOC IS TO TURN THIS GOAL INTO A REALITY. I PLEDGE TO YOU, AND TO THE AMERICAN PEOPLE, THAT IF I AM CONFIRMED AS GENERAL COUNSEL OF THE COMMISSION, I SHALL DEVOTE MYSELF TO THIS MISSION.

THE STATUTES THAT THE EEOC ENFORCES IN THE PRIVATE SECTOR PROTECT, AND ARE CRITICALLY IMPORTANT TO, ALL AMERICANS.

IT WAS DISCRIMINATION ON THE BASIS OF RACE AND COLOR THAT PROMPTED THE ENACTMENT OF TITLE VII. DISCRIMINATION AGAINST BLACK PEOPLE IN AMERICA HAS BEEN, AND CONTINUES TO BE, A NATIONAL DISGRACE -- A SORDID BLOT UPON THE HISTORY OF THIS COUNTRY. THE PAST TWENTY YEARS HAVE WITNESSED ENORMOUS PROGRESS IN THIS AREA, BUT THE BATTLE IS FAR FROM OVER. TITLE VII HAS BEEN, AND REMAINS, A KEY WEAPON IN THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY FOR BLACK AMERICANS. IT MUST BE WIELDED VIGOROUSLY AND EFFECTIVELY IF WE ARE EVER TO ROOT OUT THE EVIL OF RACE DISCRIMINATION ONCE AND FOR ALL.

WHEN TITLE VII'S PROHIBITION AGAINST SEX DISCRIMINATION WAS ADDED TO THE STATUTE, FEW FORESAW THE SOCIAL REVOLUTION IN THIS COUNTRY THAT WOULD SHORTLY BRING MILLIONS OF WOMEN INTO THE WORKFORCE. TITLE VII, COUPLED WITH THE EQUAL PAY ACT, HAS GREATLY FACILITATED THIS REVOLUTION. AGAIN, HOWEVER, WHILE MUCH HAS BEEN ACHIEVED, THERE IS MUCH MORE TO BE DONE.

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TITLE VII'S PROHIBITION AGAINST RELIGIOUS DISCRIMINATION, AND ITS REQUIREMENT THAT EMPLOYERS REASONABLY ACCOMMODATE THEIR EMPLOYEES' RELIGIOUS OBSERVANCES AND PRACTICES, OPENED NEW VISTAS OF OPPORTUNITY FOR THOSE OF US WHO OBSERVE MINORITY RELIGIONS, WITH SABBATHS OTHER THAN SUNDAY AND HOLY DAYS THAT HAVE NOT BEEN INCORPORATED INTO THE CIVIL CALENDAR. MOREOVER, IN RECENT YEARS, WITH THE DEMISE OF SUNDAY CLOSING LAWS, THESE SAME PROVISIONS HAVE COME TO PROTECT THE INTEREST OF CHRISTIANS IN OBSERVING THE SABBATH ON SUNDAY. WHATEVER THE RELIGION, WHATEVER DAY THE SABBATH OR HOLY DAY, THE COMMISSION MUST BE PREPARED TO VINDICATE THE RIGHTS OF THE OBSERVER.

DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN IS AS OLD AS THE SIGNS THAT SAID "NO IRISH NEED APPLY," AND AS NEW AS EMPLOYERS WHO DO NOT HIRE HISPANICS. NEITHER ITS AGE NOR ITS CURRENCY COMMENDS IT, HOWEVER. INDEED, THIS IS AN AREA THAT REQUIRES SPECIAL ATTENTION BY THE COMMISSION. CERTAIN GROUPS OF AMERICANS BELIEVE THAT THE EEOC DOES NOT CARE ABOUT DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN. WHATEVER MAY HAVE BEEN THE SITUATION IN THE PAST, I KNOW THAT THE PRESENT COMMISSIONERS ARE ALL DETERMINED TO ERADICATE THIS INSIDIOUS DISCRIMINATION. I SHARE THEIR DETERMINATION; I SHARE THEIR COMMITMENT.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT HAS DONE A GREAT DEAL TO CHANGE THE ENVIRONMENT IN WHICH OLDER AMERICANS WORK. BUT, AS WITH ALL THE OTHER AREAS WITHIN THE COMMISSION'S JURISDICTION, THE ISSUE HAS ONLY BEEN JOINED, THE PROBLEM HAS NOT YET BEEN SOLVED. THERE IS MUCH MORE WE MUST DO TO PROTECT

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OLDER WORKERS FROM THE INDIGNITIES THEY SUFFER AT THE HANDS OF SOME EMPLOYERS.

IT IS, OF COURSE, THE HOPE THAT THOSE SUBJECT TO THESE STATUTES WILL COMPLY WITH THEM VOLUNTARILY. AND WHERE VIOLATIONS OCCUR, THE STATUTES REQUIRE THAT THE COMMISSION SEEK REDRESS THROUGH INFORMAL METHODS OF CONFERENCE, CONCILIATION AND PERSUASION. BUT THE ULTIMATE TOOL TO SECURE COMPLIANCE AND REDRESS IS LITIGATION. THE GENERAL COUNSEL IS RESPONSIBLE FOR CONDUCTING THE COMMISSION'S ENFORCEMENT LITIGATION.

FOR THE FIRST SEVEN YEARS OF THE COMMISSION'S EXISTENCE IT HAD NO LITIGATION AUTHORITY. THEN FOR TWELVE YEARS IT EXERCISED ITS AUTHORITY IN AN UNEVEN FASHION, LEAVING MOST PEOPLE WHO SUFFERED EMPLOYMENT DISCRIMINATION TO FEND FOR THEMSELVES. THE PRESENT COMMISSION HAS RADICALLY CHANGED THIS APPROACH.

IN SEPTEMBER 1984 THE COMMISSION ADOPTED A NEW ENFORCEMENT POLICY. IN FEBRUARY 1985 IT ADOPTED A NEW POLICY ON RELIEF. TOGETHER, THESE POLICIES COMMIT THIS COMMISSION TO BRING SUIT WHENEVER AND WHEREVER IT FINDS DISCRIMINATION; TO SECURE FULL RELIEF FOR ALL THOSE WHO SUFFER DISCRIMINATION; AND TO REQUIRE AFFIRMATIVE ACTION BY THOSE WHO DISCRIMINATE. THIS AFFIRMATIVE ACTION MUST ELIMINATE THE CAUSE OF THE PAST VIOLATION, AND ENSURE NON-DISCRIMINATION IN THE FUTURE.

THIS TOUGH NEW APPROACH IS TRANSFORMING THE COMMISSION INTO AN EFFECTIVE LAW ENFORCEMENT AGENCY. I LOOK FORWARD, WITH YOUR CONSENT, TO IMPLEMENTING THE COMMISSION'S POLICIES -- TO SECURING FULL RELIEF FOR ALL WHO SUFFER EMPLOYMENT DISCRIMINATION AND

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INCREASING SUBSTANTIALLY COMPLIANCE WITH THE STATUTES' PROHIBITIONS.

THE INITIAL RESULTS OF THE COMMISSION'S NEW APPROACH ARE IN: FY 1985 WITNESSED SIGNIFICANT RISES IN CASES FILED BY THE COMMISSION AND DOLLAR BENEFITS SECURED FOR THE VICTIMS OF DISCRIMINATION. BUT THIS IS ONLY THE BEGINNING. WE MUST KEEP UP THE PRESSURE AGAINST THOSE WHO VIOLATE THE LAW BY CONTINUING TO FILE NEW CASES WHENEVER DISCRIMINATION OCCURS. AND IT IS NOT ENOUGH MERELY TO FILE CASES; THEY MUST BE PROSECUTED VIGOROUSLY, TO VINDICATE THE RIGHTS OF THOSE WHO HAVE SUFFERED UNLAWFUL DISCRIMINATION AND TO DETER FUTURE VIOLATION.

THE EEOC'S ENFORCEMENT LITIGATION WILL BE CRITICAL TO THE COMMISSION'S SUCCESS IN ITS MISSION: TO HAVE PEOPLE IN THE WORKPLACE JUDGED ON THEIR ABILITIES, NOT ON THE IRRELEVANT AND ILLEGAL BASES OF RACE, COLOR, SEX, RELIGION, NATIONAL ORIGIN, AGE OR HANDICAP.

THE CHALLENGE FACING THE NEXT GENERAL COUNSEL OF THE COMMISSION IS TO CONDUCT THIS LITIGATION EFFECTIVELY. FOR THE PAST SIXTEEN MONTHS, AS CHIEF OF STAFF IN THE OFFICE OF THE CHAIRMAN OF THE COMMISSION, I HAVE WORKED CLOSELY WITH THE MEMBERS OF THE COMMISSION, AND IN PARTICULAR WITH CHAIRMAN THOMAS. I HAVE DEVELOPED AN EXCELLENT WORKING RELATIONSHIP WITH THE CHAIRMAN AND WITH ALL THE COMMISSIONERS. I KNOW THAT THEY ARE ALL PASSIONATELY COMMITTED TO THE EEOC'S MISSION, AND THAT THEY ALL RECOGNIZE THAT ENFORCEMENT LITIGATION IS CRITICAL TO THE COMMISSION'S SUCCESS. WITH YOUR CONSENT, I LOOK FORWARD

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TO CONTINUING TO WORK WITH THE COMMISSION, AS ITS GENERAL COUNSEL, AND WITH THIS COMMITTEE, TOWARD ACHIEVING THE GOAL WE ALL SHARE: A WORK ENVIRONMENT FREE FROM INVIDIOUS DISCRIMINATION.

AT THIS TIME I WOULD BE HAPPY TO ANSWER ANY QUESTIONS YOU MAY HAVE.

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The CHAIRMAN. Thank you.

Do you feel that the Supreme Court, in the now famous case of *Firefighters Local 1784* v. *Stotts,* supported your position with regard to the use of goals and timetables in title VII cases?

Mr. ZUCKERMAN. My understanding as I read *Stotts* is that the Supreme Court essentially said that under title VII—and with specific attention to the last sentence of section 706(g) of the statute—a court may not order the hiring of someone or the discharge of someone on the basis of that person's race.

The statutory provision essentially states that no one may be ordered to be hired unless that person was refused to be hired on the basis of discrimination.

As I read *Stotts,* it precludes the type of preferential hiring that has been ordered by lower courts. Since the *Stotts* decision was issued, a number of courts of appeals have looked at the *Stotts* decision and have come to a different conclusion.

Three cases now have been briefed and argued before the Supreme Court in the current term of the Court. I would hope that with the resolution of those three cases, we will have the final, dispositive statement by the Supreme Court as to whether my understanding of 706(g) and of the *Stotts* decision is correct, or whether the courts of appeals who have disagreed are correct. What the Supreme Court rules will be the final, dispositive statement of the law.

The CHAIRMAN. All right. Critics have complained that your approach to remedying employment discrimination will take too much time, given the limited resources of the Commission itself.

On the other hand, hearings I held before this committee revealed that the average attorney at the EEOC handles less than three cases a year.

Given the Commission's resources, or perhaps I should say potential resources, will your approach to remedying discrimination be feasible?

Mr. ZUCKERMAN. We have the resources to do much, much more than what we are doing on the litigation side. As you point out, Mr. Chairman, our enforcement attorneys carry a caseload of less than three cases per attorney. This is far below the capacity of our attorneys. It is far below what I believe our attorneys are eager to do. Our attorneys are professionals who are determined to enforce these laws, and, I believe, that they are ready to take on a full caseload as long as the Commission is ready to give it to them.

The present Commission is not only ready but eager to give it to them, and if confirmed as general counsel, I, too, shall be eager to do so. We have the capacity to do so much more than what we are doing.

The CHAIRMAN. Thank you.

Let us turn to Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Mr. Zuckerman, I want to welcome you to the committee.

Mr. ZUCKERMAN. Thank you, Senator.

The CHAIRMAN. Excuse me just 1 second, if you would, Senator Kennedy.

Let me place a letter from Senator Lowell Weicker in the record. He has some written questions he would like you to answer and give explanations for. We will get those to you, and we will place that in the record without objection.

Mr. ZUCKERMAN. I will be happy to respond to them.

[Information supplied for the record follows:]

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LOWELL P. WEICKER, JR.
CONNECTICUT
Phone 202-224-4041

COMMITTEES
SMALL BUSINESS (Chairman)
APPROPRIATIONS
ENERGY
LABOR AND HUMAN RESOURCES

United States Senate

WASHINGTON, DC 20510

March 4, 1986

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The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Orrin:

Regrettably, I am unable to attend today's hearing on the nomination of Jeffrey Zuckerman to be General Counsel of the Equal Employment Opportunity Commission, because I am chairing an Appropriations hearing at which Dr. Otis Bowen will be testifying. I do, however, have a number of questions concerning Mr. Zuckerman's views on enforcement of the Equal Pay Act. Accordingly, I am submitting these questions for the record. I would appreciate a response by March 11, 1986, since Mr. Zuckerman's nomination is scheduled to be voted on March 19. Also, I would ask that Mr. Zuckerman include an explanation of the basis for each of his answers.

I appreciate your assistance in this matter.

With kind regards,

Sincerely,

Lowell Weicker, Jr.
United States Senator

LWims
Attachment

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Questions by Senator Lowell P. Weicker, Jr., of Mr. Zuckerman on the Equal Pay Act for the Record

1. Do you agree with the DOL regulation addressing the "heads of households" issue (29 CFR 800.149), which states that "[S]ince the normal pay practice in the United States is to set a wage rate in accordance with the requirements of the job itself and since a 'head of household' or 'head of family' status bears no relationship to the requirements of the job or to the individual's performance on the job, the general position of the Secretary of Labor and the Administrator is that they are not prepared to conclude that any differential allegedly based on such status is based on a 'factor other than sex' within the intent of the statute."?

2. Do you believe that the Equal Pay Act imposes strict liability on an employer who pays male and female employees unequally for equal work, irrespective of whether the employer acted in good faith (i.e., without intending to discriminate) or in the reasonable belief that its conduct was not unlawful?

3. Do you agree with the recent D.C. Circuit holding in Laffey v. Northwest Airlines, 740 F.2d 1071, 1078-80 (1984), cert. denied, 105 S.Ct. 939 (1985), that the disparate treatment analysis developed under Title VII is not applicable under the Equal Pay Act?

4. In Corning Glass Works v. Brennan, 94 S.Ct. 2223, 2233 (1974), the Supreme Court held that paying male inspection employees who worked at night a higher base wage than female inspection employees who worked during the day violated the Equal Pay Act. The Court reasoned in pertinent part as follows:

> "The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."

In light of the Supreme Court's holding and reasoning in Corning Glass, do you believe that market factors, including prior salary, can ever be a valid "factor other than sex" defense under the Act?

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5. Do you agree with the EEOC's proposed regulation addressing the concept of "establishment" under the Equal Pay Act (Fed.Reg., 9/1/81, 29 CFR 1620.3), which states that even where employees are employed in physically separate locations, two or more separate locations may constitute one "establishment" and that factors tending to show a single "establishment" are integration of activities, centralized control of activities, centralized personnel activities and policies, and central payment policies?

6. What are your views as to the correctness of the recent judicial decisions concluding that physically separate work places can constitute a single establishment under the Equal Pay Act if there is a significant functional interrelationship between the work of the employees in the various locations. See Brennan v. Goose Creek Consolidated School District, 519 F.2d 53 (5th Cir. 1975); Tomchek-May v. Brown County, 581 F. Supp. 1163 (E.D. Wisc. 1984); Grumbine v. United States, 586 F. Supp. 1144 (D.D.C. 1984); and AFSCME v. Nassau County, 609 F. Supp. 695 (E.D.N.Y. 1985).

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1217 North Belgrade Road
Silver Spring, Maryland 20902

March 11, 1986

The Honorable Orrin G. Hatch,
Chairman,
Committee on Labor and Human Resources,
United States Senate,
Washington, D.C. 20510.

Dear Chairman Hatch:

I am pleased to enclose my responses to the written questions Senator Weicker submitted in connection with the Committee's consideration of my nomination to serve as General Counsel of the Equal Employment Opportunity Commission. I have answered questions 5 and 6 jointly because of the interrelationship between them.

As Senator Weicker requested, I have explained the basis for each of my answers.

I would be happy to answer any further questions Senator Weicker may have, or to meet with him at his convenience.

Sincerely yours,

Jeffrey I. Zuckerman

(Enclosure)

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Questions for Jeffrey Zuckerman,
submitted by Senator Weicker

1. Do you agree with the DOL regulation addressing the "heads of households" issue (29 CFR 800.149), which states that "[S]ince the normal pay practice in the United States is to set a wage rate in accordance with the requirements of the job itself and since a 'head of household' or 'head of family' status bears no relationship to the requirements of the job or to the individual's performance on the job, the general position of the Secretary of Labor and the Administrator is that they are not prepared to conclude that any differential allegedly based on such status is based on a 'factor other than sex' within the intent of the statute."?

Answer: I agree with the cited regulation.

The current regulation concerning the lawfulness of "head of household" differentials under the Equal Pay Act, 29 C.F.R. §800.149, which was promulgated by the Department of Labor in 1965, provides:

> Sometimes differentials in pay to employees performing equal work are said to be based on the fact that one employee is head of a household and the other, of the opposite sex, is not. In general, such allegations have not been substantiated. Experience indicates that where such factor is claimed the wage differentials tend to be paid to employees of one sex only, regardless of the fact that employees of the opposite sex may bear equal or greater financial responsibility as head of a household or for the support of parents or other family dependents. Accordingly, since the normal pay practice in the United States is to set a wage rate in accordance with the requirements of the job itself and since a "head of household" or "head of family" status bears no relationship to the requirements of the job or to the individual's performance on the job, the general position of the Secretary of Labor and the Administrator is that they are not prepared to conclude that any differential allegedly based on such status is based on a "factor other than sex" within the intent of the statute.

Where an employer defines "head of household" in a manner that limits it to employees of one sex only, it may not then rely upon the "factor other than sex" defense of the Equal Pay

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Act to justify a "head of household" wage differential. In fact, the differential is being based upon sex.

Furthermore, even if an employer's definition of "head of household" is sex-neutral on its face, it may be a violation of the Equal Pay Act for the employer to base wage differentials upon "head of household" status, depending upon all the other facts in any particular situation. Since only a small minority of working heads of households are women, it would often be all too easy for an employer to use a facially sex-neutral definition of "head of household" as a facade for discrimination on the basis of sex. Therefore, as the present regulation provides, any employer's claim that a wage differential is based upon "head of household" status must be scrutinized carefully.

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2. Do you believe that the Equal Pay Act imposes strict liability on an employer who pays male and female employees unequally for equal work, irrespective of whether the employer acted in good faith (i.e., without intending to discriminate) or in the reasonable belief that its conduct was not unlawful?

Answer: The Equal Pay Act imposes liability on an employer who pays male and female employees unequally for equal work, unless the differential is based upon a "factor other than sex." The employer's "good faith" or "reasonable belief that its conduct was not unlawful" does not reduce or affect in any way the employer's liability for its underpayment of wages if it has violated the Act.

With respect to liquidated damages, however, the Portal-to-Portal Act, 29 U.S.C. §260, provides:

> In any action commenced prior to or on or after the date of the enactment of this Act [May 14, 1947] to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act [29 U.S.C. §216].

The Fair Labor Standards Act of 1938 provides the procedural and remedial framework for Equal Pay Act claims. Therefore, if an employer violates the Equal Pay Act, but it acted in good faith and had reasonable grounds for believing that its action was not a violation of the Act, the court may award less than the full amount, or none, of the liquidated damages that would otherwise be awarded.

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3. Do you agree with the recent D.C. Circuit holding in Laffey v. Northwest Airlines, 740 F.2d 1071, 1078-80 (1984), cert. denied, 105 S.Ct. 939 (1985), that the disparate treatment analysis developed under Title VII is not applicable under the Equal Pay Act?

Answer: I agree with the decision of the Court of Appeals, for the reasons stated at the pages cited in the question.

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4. In Corning Glass Works v. Brennan, 94 S.Ct. 2223, 2233 (1974), the Supreme Court held that paying male inspection employees who worked at night a higher base wage than female inspection employees who worked during the day violated the Equal Pay Act. The Court reasoned in pertinent part as follows:

> "The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."

In light of the Supreme Court s holding and reasoning in Corning Glass, do you believe that market factors, including prior salary, can ever be a valid "factor other than sex" defense under the Act?

Answer: Depending upon all the facts and circumstances in any particular situation, market factors, including prior salary, may be the basis for a valid "factor other than sex" defense under the Equal Pay Act. The Supreme Court itself gave an example of this in Corning Glass Works v. Brennan, 417 U.S. 188, 204 (1974): "Work on a steady night shift no doubt has psychological and physiological impacts making it less attractive than work on a day shift. The Act contemplates that a male night worker may receive a higher wage than a female day worker," and this type of shift differential falls within "the catch-all exception for differentials 'based on any other factor other than sex.'" In such a situation, the need to pay a higher wage to attract night workers would be a market factor serving as the basis of a "factor other than sex" defense. Of course, it would provide the basis for such a defense only if (1) it were truly the basis for the differential, and (2) it were applied on a nondiscriminatory basis.

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5. Do you agree with the EEOC's proposed regulation addressing the concept of "establishment" under the Equal Pay Act (Fed.Reg., 9/1/81, 29 CFR 1620.3), which states that even where employees are employed in physically separate locations, two or more separate locations may constitute one "establishment" and that factors tending to show a single "establishment" are integration of activities, centralized control of activities, centralized personnel activities and policies, and central payment policies?

6. What are your views as to the correctness of the recent judicial decisions concluding that physically separate work places can constitute a single establishment under the Equal Pay Act if there is a significant functional interrelationship between the work of the employees in the various locations. See Brennan v. Goose Creek Consolidated School District, 519 F.2d 53 (5th Cir. 1975); Tomchek-May v. Brown County, 581 F. Supp. 1163 (E.D. Wisc. 1984); Grumbine v. United States, 586 F. Supp. 1144 (D.D.C. 1984); and AFSCME V. Nassau County, 609 F. Supp. 695 (E.D.N.Y. 1985).

Answer: In my opinion, the interpretation of "establishment" for purposes of the Equal Pay Act that the EEOC proposed in 1981 was incorrect as a matter of law, because it was contrary to the Supreme Court's definition of "establishment" for purposes of the Fair Labor Standards Act, which has been recognized in Congress during consideration of amendments to the Act. I wish to emphasize, however, that it is a violation of Title VII of the Civil Rights Act of 1964 for an employer to discriminate on the basis of sex in setting the wages of its employees, even if those employees work in different establishments.

The Supreme Court has held that the word "establishment" is used in the Fair Labor Standards Act "as it is normally used in business and in government -- as meaning a distinct physical place of business." A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 496 (1945) (footnote omitted). Accord, Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027 (1957). Shortly after the Equal Pay Act was enacted, the Department of Labor issued an interpretation of the statute's reference to "any establishment," 29 C.F.R. §800.103 (1965), that was consistent with these Supreme Court decisions, and noted the Congress' recognition of the Court's definition:

> The prohibition against discrimination in wages on account of sex contained in section 6(d)(1) of the Act applies "within any establishment" in which employees who must be paid a minimum wage under section 6 are employed by an employer. The term "establishment" as used in section 6(d)(1) has the same meaning as it has in section 13(a)(2)

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and elsewhere in the Act. Although not expressly defined in the Act, this term has a well settled meaning in the application of the Act's provisions. It refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation (Phillips v. Walling, 324 U.S. 490; Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027; 95 Cong. Rec. 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., 1st Sess., p. 25). Each physically separate place of business is ordinarily considered a separate establishment. For example, where a manufacturer operates at separate locations a plant for production of its goods, a warehouse for storage and distribution, several stores from which its products are sold, and a central office for the enterprise, each physically separate place of business is a separate establishment. Under certain circumstances, however, two or more portions of a business enterprise, even though located on the same premises and under the same roof, may constitute more than one establishment. This would ordinarily be the case only if these portions of the enterprise are both physically segregated and engaged in operations which are functionally separated from each other and which have separate employees and maintain separate records. The application of these principles is illustrated further and in more detail by the discussion in §§779.303-779.306 of Part 779 of this chapter of the term "establishment" as it relates to retail or service establishments within the meaning of sections 3(s)(1) and 13(a)(2) of the Act.

The current regulations, which were adopted by the Department of Labor in 1967, continue this rule:

§800.103 Application to establishments.

The prohibition against discrimination in wages on account of sex contained in section 6(d)(1) of the Act applies "within

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any establishment" in which employees who must be paid a minimum wage under section 6 are employed by an employer. The term "establishment" as used in section 6(d)(1) has the same meaning as it has in section 13(a)(2) and elsewhere in the Act. (See §800.108.) It should be kept in mind, in determining an employer's obligations under the equal pay provisions, that "employer" and "establishment" as used in these and other provisions of the Act are not synonymous terms. An employer may have more than one establishment in which he employs employees within the meaning of the Act. In such cases, the legislative history makes clear that there shall be no comparison between wages paid to employees in different establishments.

* * * *

§800.108 Meaning of "establishment".

Although not expressly defined in the Act, the term "establishment" has a well settled meaning in the application of the Act's provisions. It refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled and has been recognized in the Congress in the course of enactment of amendatory legislation (Phillips v. Walling, 324 U.S. 490; Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027; 95 Cong. Rec. 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong. 1st sess., p. 25). Each physically separate place of business is ordinarily considered a separate establishment. For example, where a manufacturer operates at separate locations a plant for production of its goods, a warehouse for storage and distribution, several stores from which its products are sold, and a central office for the enterprise, each physically separate place of business is a separate establishment. Under certain circumstances, however, two or more portions of a business enterprise, even though located on the same premises and under the same roof, may constitute more than one establishment.

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> This would ordinarily be the case only if these portions of the enterprise are both physically segregated and engaged in operations which are functionally separated from each other and which have separate employees and maintain separate records. The application of these principles is illustrated further and in more detail by the discussion in Part 779 of this chapter of the term "establishment".

The interpretation that was proposed by the EEOC in 1981 would reverse the Supreme Court's long-standing definition of "establishment" by essentially abandoning the "distinct physical place of business" test. The proposed interpretation would instead consider two or more physically separate places of business as a single establishment on the basis of such factors as "(1) integration of activities at such locations, (2) centralized control of activities at such locations, (3) centralized personnel activities and policies, and (4) the utilization of centrally imposed pay practices which are applied on a system-wide, area-wide or other geographical-wide basis throughout such locations." 46 Fed. Reg. 43850 (Sept. 1, 1981).

The type of approach proposed by the EEOC in 1981 was followed by the district court and the court of appeals, but then was summarily rejected by the Supreme Court, in Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027 (1957), rev'g, 231 F.2d 25 (9th Cir. 1956). This type of approach also was employed in the cases cited in question #6, but other courts have adhered to the "distinct physical place of business" test of Bekins and A. H. Phillips, Inc. v. Walling, supra. E.g., Shultz v. Corning Glass Works, 319 F. Supp. 1161 (W.D.N.Y. 1970), modified on other grounds sub nom. Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973), aff'd sub nom. Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Gerlach v. Michigan Bell Telephone Co., 448 F. Supp. 1168 (E.D. Mich. 1978); Wetzel v. Liberty Mutual Insurance Co., 449 F. Supp. 397 (W.D. Pa. 1978); Jacobson v. Pitman-Moore, Inc., 573 F. Supp. 565 (D. Minn. 1983); see also Bartelt v. Berlitz School of Languages of America, Inc., 698 F.2d 1003 (9th Cir.) (dicta), cert. denied, 464 U.S. 915 (1983);

In my opinion, the Supreme Court's definition of "establishment" for purposes of the Fair Labor Standards Act is controlling, and must be followed by the lower courts and by the EEOC unless and until either the Supreme Court reverses itself or Congress amends the Act to change the definition. I once again stress, however, that it is not necessary to change the definition of "establishment" for Equal Pay Act purposes in order to reach and proscribe sex-based wage discrimination where the male and female employees work in different locations. It is a violation of Title VII of the Civil Rights Act of 1964 for an employer to

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discriminate on the basis of sex in setting the wages of its employees even if those employees work in different locations. The leading case rejecting the "distinct physical place of business" test, Brennan v. Goose Creek Independent School District, 519 F.2d 53 (5th Cir. 1975), involved the defendant's discrimination against women from 1969 to 1973. During most of that time, Title VII was not applicable to the defendant school district. Therefore, the Equal Pay Act offered the only potential avenue of relief under federal law for the women who had suffered the discrimination, and this may have prompted the court of appeals to seek to change the definition of an "establishment" for Equal Pay Act purposes in order to grant relief to those women. (The district court was motivated, apparently, by an interest in speeding up the trial.) Today, however, in light of the 1972 amendments of Title VII to cover state and local governments, similarly situated women would be able to secure relief under Title VII.

JIZ

The CHAIRMAN. I am sorry to interrupt you, Senator Kennedy.

Senator KENNEDY. The EEOC is charged with enforcing the Equal Pay Act. I would like to first of all get into that question of the Equal Pay Act. That requires equal pay for equal work by women. I would like to ask you whether you agree morally and legally that women should receive equal pay for equal work.

Mr. ZUCKERMAN. Absolutely, yes.

Senator KENNEDY. Now, as I understand the Commission staff first prepared draft regulations for the enforcement of the Equal Pay Act around November 1984; correct?

Mr. ZUCKERMAN. I am sorry.

Senator KENNEDY. The regulations for the enforcement of the Equal Pay Act, as I understand, they had regulations that had been drafted in 1984, around November 1984, I believe.

Mr. ZUCKERMAN. There have been a number of drafts, and I think there was one draft around that time. There certainly was one draft in the fall of 1984, yes.

Senator KENNEDY. OK. Now, you participated in a meeting where a presentation of the draft regulation was made to the Commissioner's special assistants?

Mr. ZUCKERMAN. Yes, sir. Actually, there was more than one meeting.

Senator KENNEDY. OK. And at that meeting, as I understand, you argued that the equal pay principles had hurt blacks in South Africa and the American South because white employers would be willing to hire blacks if they could pay them less.

Mr. ZUCKERMAN. No—I think what that sounds like——

Senator KENNEDY. Well, let me give you the full——

Mr. ZUCKERMAN. I think I was pointing out what Prof. Thomas Sowell has talked about. I think it is Prof. Thomas Sowell who has discussed the effect of equal pay for equal work in South Africa, and it is either Professor Sowell or Prof. Walter Williams who has

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discussed the effect with respect to railwaymen in the South at the turn of the century.

I think I referred to——

Senator KENNEDY. Well, is your response, then, that you were really quoting academic studies, or you were quoting at least your own view or your own position?

Mr. ZUCKERMAN. I have not studied either situation. I remember in the discussion it coming up.

Senator KENNEDY. So in this dialog, you were just referring to two academic studies, bringing that to the attention?

Mr. ZUCKERMAN. I was referring to the points made by those two——

The CHAIRMAN. Excuse me. [Conferring with staff.]

Mr. Zuckerman, it has been suggested by Senator Kennedy that I erred at the beginning of this committee session by not putting you under oath, so let us do that.

Would you stand, please?

Mr. ZUCKERMAN. Could I ask that I proceed by affirmation, Senator, for religious reasons?

The CHAIRMAN. Yes, of course.

Do you solemnly affirm to tell the truth, the whole truth and nothing but the truth?

Mr. ZUCKERMAN. Yes, I do, sir.

The CHAIRMAN. Thank you. I presume that you are willing to have your prior testimony also be considered as though under affirmation?

Mr. ZUCKERMAN. Yes, sir.

The CHAIRMAN. Thank you, Mr. Zuckerman. I appreciate it, and I am sorry that I forgot to do that at the beginning of the session.

Senator Kennedy.

Senator KENNEDY. Just to get back to this meeting, as I understand what you are saying now is that your references to the question of hiring practices in South Africa and the South were really referring to academic studies? I want to keep moving, because we have limited time.

Mr. ZUCKERMAN. Well, I raised in that meeting the points that Professor Sowell has made and the points that Professor Williams has made.

Senator KENNEDY. All right.

Mr. ZUCKERMAN. And, I believe, others, but I remember referring to those two.

Senator KENNEDY. All right. It has been mentioned by those at the meeting that you argued that women were in a similar situation and that employers would be more willing to hire them if they could pay them less than white men, even if they would prefer in general to hire men.

Do you remember making that point?

Mr. ZUCKERMAN. Yes.

Senator KENNEDY. So in that view, the EPA is not good for women; correct?

Mr. ZUCKERMAN. I think the Equal Pay Act standing alone could have led to a problem. I think that is the point that I made. But the Equal Pay Act does not stand alone. It stands with title VII. The Equal Pay Act was a beginning, but the Equal Pay Act does

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not protect women against a refusal to hire. That protection is affirded by title VII. The combination protects women against the full range of discrimination. We thus have the tools to fight through the Government—to fight through the EEOC—against all discrimination against women.

Senator KENNEDY. Well, the fact is—this concept of the disparity in pay was not the only time that you have mentioned this economic, I guess, policy, if you want to call it that. As I understand, in the draft documents, which I refer to as draft 43, June 6, 1985, you point out—I have page 19 here——

> A competitive market will punish discriminating employers and thus put an end to the discrimination only if members of the disfavored group are able to offer their labor for less than members of the favored group.

Now, is this in reference to some academic study here, too, or is this your basic belief?

Do you believe that? Let me just ask you if you believe that.

Mr. ZUCKERMAN. I am sorry, Senator. I am trying to find the page.

Senator KENNEDY. I have referred to the document. Just if you would answer.

The CHAIRMAN. What document is it?

Senator KENNEDY. It is draft 43, page 19 at the top. That has been provided by the committee.

The CHAIRMAN. OK.

Senator KENNEDY. Do you believe that "* * * only if members of the disfavored group are able to offer their labor for less than members of the favored group earn"?

You can tell me if you believe it, and then if you——

Mr. ZUCKERMAN. OK, Senator. On page 18, leading up to that, is a long quote from Professor Sowell's book, "Civil Rights: Rhetoric or Reality." What he wrote and what I wrote are talking about a competitive market without laws against discrimination. This is the way a competitive market will punish discrimination.

This country, however, since 1964, and since 1963 with respect to wage discrimination against women, has gone beyond what a competitive market will punish and how the competitive market will punish it. This country has made it against the law for an employer to discriminate, and made it for the EEOC and other agencies of Government to punish that discrimination.

Senator KENNEDY. It continues,

> The Equal Pay Act denied women a market-based tool available to overcome sex-based discrimination, the ability to offer their labor for less than men, but did not prohibit employers from refusing to hire women. Thus, an employer who was inclined not to hire women just because of their sex was free to do so, and women were stripped of their most potent weapon for trying to induce such employers not to discriminate.

I am just troubled by the fact that we had received information that during the course of the consideration of these regulations that the argument was made—and at least this is the first time I have heard a reference to it being presented as an academic argument—about the employment of blacks and women, and the argument was made about the economic implications in the South, that at least it was the impression of the staffers who were at that meeting—so they have reported—that the case was made almost

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for affirmative action for women, that the way we are going to get them actually employed is by paying them less.

Now, that may be unfair to you, but that is certainly the information that has been made, and, of course, it is obviously troublesome because that would be discrimination on the basis of sex, which would violate the legislation on its face.

Mr. ZUCKERMAN. Absolutely.

Senator KENNEDY. So that is why I have gotten into this particular issue, because, I think, it raises very profound questions about the nature of the commitment to the Equal Pay Act and the basic, fundamental commitment to what this committee viewed as being the purposes of that act in the past, and that is that we were going to eliminate tc the extent that legislation possibly can discrimination on the basis of sex, and we were going to eliminate discrimination on the basis of pay.

And why these arguments or studies were raised in the consideration of regulations is something I have a great deal of difficulty in understanding, because they have absolutely nothing to do with the carrying forward of that legislation, which was very clear on its intent.

Mr. ZUCKERMAN. Senator, I do not recall how the discussion of Professor Sowell and Professor Williams came up in the discussion of the regulations. I recall that it did come up. I do not remember what led into it.

We were talking about pre-Equal Pay Act, pre-title VII. There was no Federal law against discrimination of any sort; certainly no law against discrimination against women.

In that situation, there is this academic question: What will the market do if someone discriminates? And that is discussed in this long quote from Professor Sowell on page 18 of document No. 43.

Basically, the argument there is that a woman will offer her labor for less, and thereby get employed and overcome the discrimination.

What this Congress did in 1963, and what I support without hesitation—and I hope there is no mistake about this—what this Congress did was to make it against the law to pay a woman less than a man for the same work. I agree with that principle 100 percent, and if confirmed as general counsel, I would enforce that law without hesitation and with all of the ability that I have.

What I pointed out in the document is that while the Equal Pay Act required an employer if it hired a woman to pay her the same as a man, it still left it permissible as a matter of Federal law that an employer could simply refuse to hire a woman if the employer so chose.

One year later, with title VII, that opening and every other kind of opening with respect to discrimination against women was closed. It was made against the law to discriminate against women with respect to any aspect of the terms and conditions of their employment.

So, whatever the market would have done without those statutes, the point is that the Government, in my opinion properly—the Government undertook to correct this situation, to prohibit discrimination, to make it unlawful to discriminate. Since 1963, it has been unlawful to discriminate on the basis of wages against

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women; and since 1964, it has been unlawful to discriminate against women in any way with respect to their terms and conditions of employment.

Senator KENNEDY. Well, that is the point, if I can just sharpen it. That is the point that we have to ask them why the devil did you raise this argument in 1984. I mean, what was the point of that? It is so clear. I mean, you have made the case for me. Then, why are we spending any time talking in 1984 about these other conditions? We have already resolved that. The Congress has resolved it. Previous regulations resolved it. And it is alleged that in those meetings, in the consideration of regulations, that you were recommending or suggesting at least that now. That is the question.

Why would any committee which is considering regulations talk about something that has absolutely no relation to it, for the reasons you have just outlined? That is the point that is troublesome.

I mean, to the best of your recollection—this is a very important subject, and it really is not that long ago.

Mr. ZUCKERMAN. I have the recollection that it came up, because I remember one of the staffers after the meeting—at least one—asked me to borrow Professor Sowell's book, "Civil Rights: Rhetoric or Reality?"

Senator KENNEDY. Who was that? Do you remember what staffer that was?

Mr. ZUCKERMAN. I—I do, Senator, I remember who that staffer was.

Senator KENNEDY. Well, is there any problem in telling us that?

Mr. ZUCKERMAN [pause]. I—I—I hesitate about naming a staffer in this context, just somehow bringing the names of career staffers from the Commission into the discussion. I cannot tell you why. I just have a hesitation about that.

Senator KENNEDY. Well, they are not up before us.

Mr. ZUCKERMAN. I know. That is why. I suppose I would have no hesitation telling you off the record. But just introducing a career staffer's name into the record—if you say you want me to, I guess I will.

Senator KENNEDY. Well, if you feel more comfortable just telling the staff, I would not object.

I will yield to Senator Hawkins, who I understand has another confirmation hearing.

Senator HAWKINS. Yes; I have another confirmation hearing. Thank you.

The Senator from Florida is concerned over the slow pace that the EEOC is proceeding on several issues of importance to the older employees. Why hasn't the EEOC issued regulations regarding the discrimination that older workers face in apprenticeship programs?

Mr. ZUCKERMAN. The Commission approved a notice of proposed rulemaking on that issue, and in accordance with an Executive order, submitted it to the Office of Management and Budget. I guess that was under Executive Order 12291. The Office of Management and Budget ultimately, fairly recently, returned it to the Commission as being inconsistent with the principles of the President's Regulatory Program as set out in Executive Order 12291.

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The Commission did, in fact, adopt a notice of proposed rulemaking that would have prohibited discrimination on the basis of age in apprenticeship training programs.

Senator HAWKINS. Well, years ago, regulations exempted apprenticeship programs as highly discriminatory against the older women who entered the work force late. EEOC voted to change that in 1984 and issue new regs?

Mr. ZUCKERMAN. I think it was June 1984; yes, Senator.

Senator HAWKINS. What was your responsibility for the preparation for these regulations as Chief of Staff?

Mr. ZUCKERMAN. The notice of proposed rulemaking was approved before I arrived at the Commission in August 1984. My recollection is that they were approved in June 1984. In other words, they were approved, I think, 2 months before I arrived at the Commission.

Senator HAWKINS. So you were not responsible for drafting those regulations?

Mr. ZUCKERMAN. No, Senator.

Senator HAWKINS. Do you know what has happened since they were sent to OMB?

Mr. ZUCKERMAN. I think it was in December that OMB returned them to the Commission as being inconsistent with the principles——

Senator HAWKINS. That was in December?

Mr. ZUCKERMAN. Of 1985.

Senator HAWKINS. Of 1985?

Mr. ZUCKERMAN. Yes, Senator.

Senator HAWKINS. You sent them over in June 1984?

Mr. ZUCKERMAN. Yes, Senator.

Senator HAWKINS. And did not get them back until December 1985.

Has there been any dispute with any other Federal agency?

Mr. ZUCKERMAN. Over those regulations?

Senator HAWKINS. Any regulations that you have been writing.

Mr. ZUCKERMAN. Yes. With respect to those regulations in particular, the Department of Labor, which had prepared the original regulations back in the days when they had responsibility for enforcement of the statute, they opposed, or at least objected to, our proposed change in those regulations.

Senator HAWKINS. Have you requested any formal dispute mechanism?

Mr. ZUCKERMAN. No. There is no formal dispute mechanism under Executive Order 12291. We went to OMB. I remember the Chairman and I went over to OMB once.

Senator HAWKINS. Whom did you talk to over there?

Mr. ZUCKERMAN. John Cogan.

Senator HAWKINS. Is he there now?

Mr. ZUCKERMAN. No; he has left.

Senator HAWKINS. They are almost all new people over there; they wear out fast.

Are you doing anything to propose a fairer regulation? Do you have a proposal of your own?

Mr. ZUCKERMAN. I am sorry, Senator. I did not hear the question.

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Senator HAWKINS. Does the EEOC have a proposal of their own regarding this?

Mr. ZUCKERMAN. Regarding apprenticeship?

Senator HAWKINS. Yes.

Mr. ZUCKERMAN. Our proposal was to make it clear that apprenticeship training programs are subject to the Age Discrimination in Employment Act, and that therefore age discrimination in apprenticeship training programs would be prohibited. That was our proposal.

The existing regulation, which was issued by the Department of Labor, exempts apprenticeship training programs from the Age Discrimination in Employment Act.

Senator HAWKINS. Are you doing anything to push that proposal?

Mr. ZUCKERMAN. I would say that with OMB having returned it, it is now up to the chairman and the other Commissioners to try to figure out what to do from here.

Senator HAWKINS. Do you want to tell me what you think they are going to do, or is that up to the Commissioners, and you are just going to be an expediter?

Mr. ZUCKERMAN. That is the Commissioners who will decide how to pursue the matter further.

Senator HAWKINS. Do you have any view on that?

Mr. ZUCKERMAN. I think the chairman testified once at an oversight hearing that it was very hard to deal with OMB when they oppose a regulatory change. Under the terms of the various Executive orders, they seem to hold all the cards in the deck.

But I think we need to see if there is some way to break this deadlock and move forward.

Senator HAWKINS. Well, it is mandatory that we do it, and I feel that you have a deep responsibility to——

Senator METZENBAUM. Pardon me, if the Senator from Florida would yield. I thought you asked a very important question, and you did not get an answer. And the Senator from Massachusetts asked a question before.

The Senator from Florida asked you, do you have a view on that, and what is your view, and you then went on to talk about the OMB and the Commission.

I think we are entitled to have the answer as to what is your position on the very question she asked you.

Senator HAWKINS. As far as the apprenticeship program goes.

Mr. ZUCKERMAN. I think the Commission having adopted that rule, I think we must do whatever possibly can be done to persuade the Office of Management and Budget to allow it to be published.

Senator METZENBAUM. Is that your view?

Mr. ZUCKERMAN. That is what we have tried to do, yes, sir.

Senator METZENBAUM. Thank you.

Senator HAWKINS. Well, I am annoyed at the time it has taken, and I do not know how any legitimate regulatory body can sit and wait 18 months or longer for the OMB to move; and to hold it from June 1984 to December 1985 is inexcusable.

So you say they are hard to deal with? We deal with them on a daily basis. And maybe you need some assistance down there, telling us some oversight from this committee, telling you what we

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think the high priorities are, what you can put aside. There is no dispute on this. You feel the same as we do on this apprenticeship program. And for them to sit on it for 18 months and then start another controversy is inexcusable. So I think that we need to maybe sit down with the Commissioners and you and have you come up here and sit down with us, and have OMB on the other side of the table. That is the way you work it up here—because you need a lot of help. And the Senators get the bad reputation. They do not think anything about you or any of the Commissioners down there. It is the Senators who approved you, the Senators who nominated you, and the Senators who voted for you. And I think we need a lot of cooperation if you get this position, because I do not subscribe to the philosophy of letting OMB just totally manage the total programs of this committee; I never have. I have taken them on a lot of times by myself, and when I get the chairman and some others to go with me, it is very effective. And you have that ability to come and tell us what you need.

And do not sit down and say, "OMB has got it." You know, that is very childish, in the first place, and it is not mature. And the mature people I have in my State do not understand that.

The CHAIRMAN. I think the Senator makes a good point, and that is the Commission wants to do this, but OMB is a roadblock, and I think sometimes you do have to take them on. They are not the last word on everything. We in the Congress pretty well make sure of that on almost everything.

I would like to ask my colleagues on the minority, Senator Grassley has some short questions, and he feels he can get those over in just a second.

Senator METZENBAUM. Go right ahead.

The CHAIRMAN. If you can quickly, Senator Grassley, we will defer to you.

Senator GRASSLEY. Thank you, Mr. Chairman.

My questions deal with the subject of pension accrual after age 65, and I have legislation in on that area. Of course, you know the EEOC voted twice, first in June 1984 and then a second time in March 1985, to require under the Age Discrimination in Employment Act that employers continue to accrue pension beyond age 65.

So my questions deal with any contact you would have had in that area. In your capacity as Chief of Staff in the Office of the Chairman, what role did you play in briefing the chairman and other members of the Commission on that issue?

Mr. ZUCKERMAN. I talked about it with the chairman and with at least some, if not all, of the other Commissioners, before that second vote. I have talked with the chairman about it since that vote.

Senator GRASSLEY. And you would characterize that involvement as being one of indepth briefing of the members on it and a great deal of involvement with the issue?

Mr. ZUCKERMAN. The Chairman and I have talked about it several times, and in some depth.

Senator GRASSLEY. OK. What is the status of the regulations to implement the Commissioners' vote requiring post-65 pension accrual?

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Mr. ZUCKERMAN. A regulatory impact analysis is required under Executive Order 12291. Having adopted a notice of proposed rulemaking, the Commission is now engaged in securing the required regulatory impact analysis.

Senator GRASSLEY. When do you think that will be completed?

Mr. ZUCKERMAN. The staff says that it is on target to be completed by the end of this month.

Senator GRASSLEY. What has been your responsibility for preparing and issuing regulations implementing the Commissioners' decision on this issue?

Mr. ZUCKERMAN. There was one draft of regulations that was prepared by the staff and discussed at a meeting of special assistants to the Commissioners. I participated in the discussion of that draft.

Senator GRASSLEY. OK. When do you anticipate that the Commission will issue its proposed rules?

Mr. ZUCKERMAN. Well, I would certainly hope that this will happen. As soon as this regulatory impact analysis is completed. I understand that our staff is also having some technical discussions with people from, I think, IRS, maybe PBGC. These technical discussions are intended to make sure that the language we use is technically compatible with the language of pension law.

I would hope that just as soon as that is done that the Commission would send the notice of proposed rulemaking to the Office of Management and Budget.

Senator GRASSLEY. Do you personally agree or disagree with the Commission's vote to require post-65 pension accrual?

Mr. ZUCKERMAN. Well, the Commission having voted, my role——

Senator KENNEDY. Could you answer the question, because I am going to ask it to you. He just asked you what your view is. Can you just say, I agree or I differ?

Mr. ZUCKERMAN. Before the vote, it was my view that as a matter of law, looking particularly, but not only, at the congressional deliberations in 1978 over the amendment of the Age Discrimination in Employment Act, that it was Congress' express intention that the continued accrual of pension benefits not be required.

The Commission having decided on its review of all the relevant matter that continued accrual of pension benefits is required, it is my responsibility and my present job to help the chairman in any way I can to get that position published and effective. As general counsel, that would continue to be my responsibility, and I would do that to the best of my ability, as I have been doing it.

Senator GRASSLEY. Then, your personal view would have been in disagreement with the Commission, even though you accept their judgment now and are moving forward in that direction.

I would like to know what is the basis of your disagreement with the Commission's vote on this issue other than the general statement you just gave, that you had studied what you thought was congressional intent.

Mr. ZUCKERMAN. Looking at the legislative history of the 1978 Amendments of the Age Discrimination in Employment Act, this precise issue of whether pension benefits would have to continue to

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be accrued beyond normal retirement age was raised in both the House and in the Senate. In both places, it was made very formally a part of the legislative history that the accrual of pension benefits would not be required to continue beyond the normal retirement age of a pension plan. There was even a letter requested from and provided by the Department of Labor saying that this would not be required. Congress having made that a specific part of the legislative history, and that being consistent with a Supreme Court decision interpreting the original 1967 act, that being consistent with the Department of Labor regulations interpreting the 1967 act, that being consistent with the language of the 1967 act, but above all, it being so clearly set out by Congress in 1978, on that basis, it was my judgment on the law that continued accrual was not required by the statute.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Stafford, do you have any questions?

Senator STAFFORD. Not at this time, Mr. Chairman.

I would like to reserve the right by unanimous consent to submit some questions in writing if they occur to me.

The CHAIRMAN. We will keep the record open.

Senator STAFFORD. As I have listened so far this morning—and it has not been as long as I would like—it seems to me that the committee not only wants to know what the nominee's legal judgments may be, but more about your personal thinking and viewpoints on some of the issues that are before this committee. And I think the witness might be wise if he indicated his own personal feelings on some of the issues, fully as much as indicating what his legal judgments may have been at the time the issues occurred.

The CHAIRMAN. Thank you, Senator Stafford.

Now, what I am trying to do here—I know that most of the questions are going to be on the minority side today.

But Senator Nickles has one question, so why don't we allow you to ask that?

Senator NICKLES. Thank you, Mr. Chairman.

Mr. Zuckerman, will you state before this committee that if confirmed, you will enforce the laws within the purview of the Commission, passed by the Congress and interpreted by the Supreme Court?

Mr. ZUCKERMAN. Absolutely, with every bit of ability and energy that I can muster.

Senator NICKLES. Thank you.

Thank you, Mr. Chairman.

Senator METZENBAUM. I want to just ask my colleague from Oklahoma, did he think there was any possible other answer that a proposed nominee might give?

Did you think he would really come up here and say, "No, I am not going to enforce the laws"? [Laughter.]

Senator NICKLES. I just wanted to see how he answered your questions, keeping this one in mind.

Senator QUAYLE. No, but he knew that he would get a statement from the Senator from Ohio; that is why he asked the question.

The CHAIRMAN. Senator Quayle, do you have a question?

Senator QUAYLE. Well, aren't we going back and forth, here?

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The CHAIRMAN. We can, if you would like.

Senator QUAYLE. We are excluding our Democratic colleagues.

The CHAIRMAN. No, no.

Senator QUAYLE. I am here. I wanted to listen to what the witness had to say. I have a couple of questions. But are we on the 10-minute rule, and back and forth? I would like to go back and forth. I want to hear what Senator Kennedy says and what some other Senators say. But I do have some questions. So after one or two of them go—I do not know. What kind of a procedure is this, Mr. Chairman?

Is this the "Hatch rule"? I do not know about that.

The CHAIRMAN. May I take control of the committee for just a second, please?

Senator QUAYLE. Please, tell us what is going on here.

The CHAIRMAN. Well, what my friends on the Democratic side have done is—I have asked Senator Kennedy, because we have only had a few questions, and Senator Grassley had to go, if we could accommodate this side and get those questions taken care of. We are happy to alternate back and forth, and we are happy to have a 10-minute rule.

Senator Kennedy had taken about 10 minutes before. But let us turn to Senator Kennedy and give him the next 10 minutes, and then we will turn to you.

Senator KENNEDY. I thank the Senator from Indiana for looking out after the questioning by this side.

I want to indicate that, as the chairman pointed out, Senator Hawkins had two or three questions, and also Senator Grassley, and we were glad out of comity to permit them to ask their questions. But I think the Chair has indicated that we would balance off.

I will just make the comment that I guess we will go, ourselves, on the 10-minute rule, and I suppose I have gone my 10 minutes.

But I just want to remind the witness that, as Senator Stafford has pointed out, you are going to have enormous discretion on what cases are brought and making decisions about these various matters as the chief counsel. And if you believe that the pension rights do not vest, and that is a matter of your own belief, and even in spite of the fact that the Commission has made a decision twice on a four-nothing vote that they do. You know, this committee is committed toward protecting the interests of the senior citizens, and have been very much involved in shaping and fashioning that legislation. And if you believe that it did, this is something that we have got to know. And the more you can elaborate on your own personal views on this, I think it gives us a better feeling as to whether those laws are actually going to be enforced, and that you feel that those areas are of sufficient priority in terms of your time and resources and personnel. That is, at least as far as my questions go, what I am driving at.

Whatever comments or reaction you want to give, please go ahead.

Mr. ZUCKERMAN. I understand, Senator Kennedy and Senator Stafford, and I will be happy to give my personal legal judgment on anything I am asked, or any other kind of judgment I am asked.

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I would add, though, that my personal judgment is not the determining factor. All litigation is authorized by the Commission, and I will as vigorously as I can prosecute the litigation as authorized by the Commission. I will enforce the law in accordance with the statute and the congressional intent underlying the statute, as interpreted by the Supreme Court, as determined by the Commission. They are the ones who decide the interpretation of the statute. I will advise, but I will enforce in accordance with the law.

Senator STAFFORD. Would the Senator yield just for a comment there?

Senator KENNEDY. Yes.

Senator STAFFORD. Mr. Nominee, I was once the attorney general of my State, and I at that time wrote a few opinions I later regretted when I was Governor, I would have to say. But, I think, what this committee is trying to do in probing whether we should confirm you or not is go beyond at some point your legal judgment. And the committee wants to know something about your philosophical attitude on some of these issues, irrespective of the fact that I would totally concur in the necessity for you to carry out the laws as you see them. And you are saying you would do that, and I believe you.

I think the committee is trying to find out how do you feel about some of these things personally, aside from legal niceties.

The CHAIRMAN. OK. Senator Metzenbaum.

Senator KENNEDY. If I could just finish this point, because it gets back to Senator Stafford.

Mr. ZUCKERMAN. I understand.

Senator KENNEDY. And on the pension program, we asked you why your viewpoint is important. Now, as I understand, there were two meetings with OMB after the EEOC reached their decision 4-to-0. And you participated in both meetings. I want to know in the first meeting, did you represent the EEOC's position?

Mr. ZUCKERMAN. Yes, sir.

Senator KENNEDY. Yes. So you represented the EEOC's position in the first meeting. Then, in the second meeting, what was your position and what was your recommendation?

Mr. ZUCKERMAN. Well, I hesitate, because I am trying to think about what this second meeting was. Let me back up, Senator, because I misspoke on the first meeting.

The first meeting was not with OMB. I am trying to remember any meeting with OMB. There was a meeting——

Senator KENNEDY. With the Council of Economic Advisers; is that right?

Mr. ZUCKERMAN. Right, OK. That is the meeting I have in mind.

Senator KENNEDY. All right. Now, what was your position there?

Mr. ZUCKERMAN. To defend the EEOC position.

Senator KENNEDY. OK. And a representative of the Office of Management and Budget was there, was he not?

Mr. ZUCKERMAN. As I recall, there was at least one person from OMB there. There were a number of people from different agencies.

Senator KENNEDY. All right. And as I understand it, the representatives of the executive branch said that they did not agree with EEOC's position.

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Mr. ZUCKERMAN. None of the others from the executive branch agreed with us; I think that is correct.

Senator KENNEDY. All right. And there was discussion on ways to change the Commission's decision?

Mr. ZUCKERMAN. On ways to change it?

Senator KENNEDY. That is right.

Mr. ZUCKERMAN. I do not——

Senator KENNEDY. To undo the Commission's decision. We are getting so wrapped up—this is going to be a long, long hearing if we have to go through a lot of semantics.

At any time during that particular meeting since, as you have said yourself that all of the executive representatives of the executive agencies opposed the proposal that had been voted in terms of the EEOC four-to-nothing, was there any attempt to try and undo that recommendation?

Mr. ZUCKERMAN. An attempt at that meeting?

Senator KENNEDY. Yes.

Mr. ZUCKERMAN. No, sir.

Senator KENNEDY. Or any discussion at that meeting?

Mr. ZUCKERMAN. I am sure the others indicated that they would try to—the others made it clear that they were opposed to the position taken by the EEOC.

Senator KENNEDY. So there was discussion at that meeting—otherwise, Mr. Chairman, I hope we get a list of those—if we cannot get a response on it, that we can get a list of those who attended it, and subpoena them and get them up here. I mean, we just want to find out whether there was a discussion about how to undo the EEOC's recommendation.

Could you give us an answer to that?

[Information supplied follows:]

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United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, DC 20510

March 4, 1986

Honorable Orrin G. Hatch
Chairman
Committee on Labor and
Human Resources
United States Senate
Washington, D.C. 20510

Dear Orrin:

As I suggested at this morning's hearing, I would like a list from Mr. Zuckerman of the names and positions of the persons who attended the following meetings at which Mr. Zuckerman was also present:

(1) The Fall 1984 EEOC staff meeting where the Equal Pay Act was discussed;

(2) The CEA/OMB meeting where the EEOC's pension accrual decision was discussed;

(3) The OMB meeting where the EEOC's pension accrual decision was discussed.

These lists should be furnished to me before the next scheduled hearing on Mr. Zuckerman's nomination. As always, thanks for your cooperation.

Sincerely,

Edward M. Kennedy
Ranking Minority Member

EMK/trd

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1217 North Belgrade Road
Silver Spring, Maryland 20902

March 17, 1986

The Honorable Orrin G. Hatch,
Chairman,
Committee on Labor and Human Resources,
United States Senate,
Washington, D.C. 20510.

Dear Chairman Hatch:

In a letter to you dated March 4, 1986, Senator Kennedy asked that I provide a list of the names and positions of the persons who attended certain meetings. I am pleased to provide the following information in response to Senator Kennedy's request.

1. I attended three meetings of the Special Assistants to the Commissioners during the Fall of 1984 at which a set of draft regulations interpreting the Equal Pay Act were discussed. The dates of those meetings, and the other persons who attended them, were:

November 1, 1984

Michael Baldonado, Special Assistant to Commissioner Gallegos
Marjorie Borders, Special Assistant to the Legal Counsel
Lorraine Davis, Special Assistant to the General Counsel
Anthony DeMarco, Assistant Legal Counsel
Frederick Ford, Attorney, Office of Legal Counsel
Raj Gupta, Special Assistant to Commissioner Webb
Johnnie Johnson, Attorney, Executive Secretariat
Sandra Little, Special Assistant to Chairman Thomas
Cynthia Matthews, Executive Officer
Karen Morton, Attorney, Office of Legal Counsel
Barbara Parris, Policy Analyst, Executive Secretariat
Jaime Ramon, Special Assistant to Commissioner Gallegos
Pam Talkin, Special Assistant to Commissioner Alvarez
Doris Werwie, Special Assistant to the Director, Office of Program Research

November 15, 1984

Mss. Borders, Little, Matthews, Parris and Talkin
Messrs. DeMarco, Ford, Gupta and Ramon

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December 13, 1984

Mss. Little, Matthews, Morton, Parris and Talkin
Messrs. DeMarco, Ford, Gupta, Johnson and Ramon
Sylvia Danovitch, Special Assistant to Commissioner Silberman
Cassandra Menoken, Special Assistant to Commissioner Webb
Grant Morris, Special Assistant to Commissioner Silberman

2. On September 25, 1984, I attended a meeting of the "Pension Policy Working Group," in the office of Dr. William Niskanen, a member of the President's Council of Economic Advisers. In addition to Dr. Niskanen and me, the following individuals were present:

Tom Antrus, Office of Management and Budget
Jim Brown, Office of Management and Budget
Allyson Duncan, Acting Associate Legal Counsel, EEOC
Joe Grundfest, Council of Economic Advisers
Richard Ippolito, Department of Labor
Chris Mackaronis, Attorney, Office of Legal Counsel, EEOC
Jay Pagano, Assistant Legal Counsel, EEOC
Kevin Purt, Pension Benefit Guaranty Corporation
Stu Sirkin, Internal Revenue Service
Charles Tharp, Pension Benefit Guaranty Corporation
Kathy Utgoff, Council of Economic Advisers
Tom Veal, Pension Benefit Guaranty Corporation

3. I have attended four meetings at the Office of Management of Budget at which the pension benefit accrual issue has been discussed. The dates of those meetings, and the other persons who attended them, were:

February 14, 1985

Tom Arthur, Office of Management and Budget
Jimmy Mason, Office of Management and Budget
Arnold Strosser, Office of Management and Budget
Kathy Utgoff, Council of Economic Advisers
Nancy Wentzler, Office of Management and Budget

March 19, 1985

Fred W. Alvarez, Commissioner, EEOC
Jim Brown, Office of Management and Budget
Michael Horowitz, Office of Management and Budget
R. Gaull Silberman, Commissioner, EEOC

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June 17, 1985

Jimmy Mason, Office of Management and Budget
Nancy Wentzler, Office of Management and Budget

June 27, 1985

Doug Ginsburg, Office of Management and Budget
Michael Horowitz, Office of Management and Budget
Clarence Thomas, Chairman, EEOC
Joe Wright, Office of Management and Budget

Please let me know if there is any further information that Senator Kennedy or any other member of the Committee would like me to provide.

Sincerely yours,

Jeffrey I. Zuckerman

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Mr. ZUCKERMAN. There may have been, sir. I do not recall that being discussed. It may well have been, it may not. I simply do not recall that having been discussed.

Senator KENNEDY. Well, you do recall that the executive branch opposed the EEOC's position?

Mr. ZUCKERMAN. Everyone else there, everyone but the EEOC people, opposed the EEOC's proposed change.

Senator KENNEDY. And you are suggesting that you yourself were strongly in support of the EEOC's position at that meeting.

Mr. ZUCKERMAN. Yes, sir.

Senator KENNEDY. Well, at least the information that has been given to us is that there was a discussion from the administration's people about how to undo the EEOC. I will say that. You do not have to. But let me go on.

After that meeting, did you tell the staff at the Commission that you thought the Commission's decision was wrong?

Mr. ZUCKERMAN. After that? Yes. And in fact, on the way over there—yes, sir——

Senator KENNEDY. All right. So as Senator Stafford and others have pointed out, you have one position that you yourself have taken that you did not believe the EEOC's position was correct.

Mr. ZUCKERMAN. That is right, sir.

Senator KENNEDY. But we understand that you went into a meeting with the other agencies that have to sign off in terms of the implementation of those regulations, and your testimony is that you supported—vigorously, I imagine—the EEOC's position. Then sometime after that meeting, where the representatives of the executive opposed that EEOC position, then you are back and talking to the staff and indicating to them that you thought the EEOC's position was incorrect.

I must say, that reversal in a matter of a relatively short period of time, on an issue which is at the heart of this whole function of

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EEOC is troublesome. And, I think, it is fair, in asking what your views are about this, we have to know whether we are having someone down there who is going to believe in this legislation and find repugnant discrimination in our society, whether it is against aged people, women, minorities, or whether we have got someone down there who can flip-flop back and forth on the basis of meeting with a few executive bureaucrats.

I do not want to do a disservice, but that is where I am coming out, and if I am doing a disservice to you, I am prepared for a vigorous rebuttal—I hope I will get it.

Mr. ZUCKERMAN. Let me add one fact to the scenario. It was in preparation for this meeting at CEA that I first looked into the issue. And as I recall, it was on the way over to the CEA meeting that I first raised with the EEOC staff a concern I had about their legal analysis.

Senator KENNEDY. This was the first time you got their recommendation?

Mr. ZUCKERMAN. No, no, no. In preparation for the meeting, I had been studying the papers prepared by the staff that had been the basis for the Commission's decision. That decision had been made and those papers had been prepared before I had arrived at the Commission. In preparation for the meeting, I reviewed those papers. I looked over, in particular, a Supreme Court decision the staff had cited—and I had questions about their legal analysis. I raised those questions—at least, that one question—with the staff on the way over to CEA, indicating I was already at that point troubled by their legal analysis.

Nonetheless, at the meeting at CEA, I advocated as well as I could and with all the ability that I had, the legal position of the Commission.

The CHAIRMAN. But you still remained troubled after that meeting, is that correct?

Mr. ZUCKERMAN. Yes, sir. And that is where you have, among the documents produced, a memorandum that the Chairman sent to our Office of Legal Counsel, raising some legal concerns with the previous analysis.

The CHAIRMAN. Let me just say this. I do not see any problem with that, if you were troubled before but you did advocate the position that the EEOC wanted you to advocate as its attorney, and you remained troubled afterwards; I do not see any problem with that, and I do not see anything insidious about it or unforeseen or untoward. The fact is that you as an attorney argued their position. But you still have questions about what it is you are saying.

Mr. ZUCKERMAN. Yes, sir.

Senator STAFFORD. Would the Senator yield to me once more for just 1 minute?

The CHAIRMAN. Sure. I would be glad to.

Senator STAFFORD. As I understand it now, Mr. Witness, your legal judgment was that the EEOC was wrong in their position in going to this meeting, but that nevertheless, you considered it your duty—and I think you were correct—to defend the EEOC position at this meeting with members of the executive department. Am I correct thus far?

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Mr. ZUCKERMAN. Yes, sir. Well, actually, it is an overstatement to say that before the meeting I was convinced that the EEOC staff's legal analysis was wrong. I had serious questions about it.

Senator STAFFORD. You had serious legal doubts.

Mr. ZUCKERMAN. Questions, at that point.

Senator STAFFORD. All right. Before the meeting, did you have any personal philosophical questions or problems with the EEOC position?

Mr. ZUCKERMAN. I do not recall having thought about it in those terms— —

Senator KENNEDY. You answered the question earlier. You answered that question, and you said yes.

Senator STAFFORD. That is the heart of what this Committee probably wants to know.

Mr. ZUCKERMAN. You are asking whether before that meeting I had thought about the accrual of pension benefits in philosophical terms, and I do not recall having thought about it in those terms before that meeting. Chairman Thomas had told me that the Commission's decision had been based upon legal analysis. Therefore, I spent the little time I had before the meeting trying to get a firm grip on the legal issues.

The CHAIRMAN. You were troubled, you advocated the position, and you still remained troubled after you advocated the position. Is that a fair statement of where you were?

Mr. ZUCKERMAN. Yes, sir.

The CHAIRMAN. So you did not go into a big philosophical analysis of it; you were troubled legally.

Mr. ZUCKERMAN. Well, I guess at the CEA meeting Mr. Niskanen raised some kind of general philosophical discussion. I always came back to the point that the Commission was not acting on philosophy; the Commission was acting on law. And whatever might be the wisdom or unwisdom of the Commission's position, or good philosophy or bad philosophy, on the law, the continued accrual of pension benefits was required.

Senator STAFFORD. Well, you did what you should have done as far as the meeting was concerned. I was trying to find out how you personally felt about it before you got to the meeting, what your personal viewpoint on this was, irrespective of all the legal niceties, and I have one more question after that. If you do not recall that you thought about it or had an attitude about it, that is the answer, I guess.

Mr. ZUCKERMAN. Before the meeting, I had not thought about it in those terms, Senator.

Senator STAFFORD. You had not.

All right. Finally, let me understand again what you did after the meeting. Did you then say that you thought the EEOC' position was wrong?

Mr. ZUCKERMAN. Ultimately, yes, at the EEOC.

Senator STAFFORD. You did.

Mr. ZUCKERMAN. Yes, sir.

Senator STAFFORD. And you advised the Commission to that effect?

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Mr. ZUCKERMAN. Well, as I said, I told the Chairman that I thought it was wrong. I talked with at least some and perhaps all of the other Commissioners.

Senator STAFFORD. And this was a legal judgment based on the law as you understood it?

Mr. ZUCKERMAN. Yes, sir.

Senator STAFFORD. All right. Thank you.

The CHAIRMAN. Senator Kennedy, maybe we should wrap up this one point.

Senator KENNEDY. Well——

Mr. ZUCKERMAN. Senator Kennedy, if I may, I remember later a meeting at OMB on this same subject.

Senator KENNEDY [continuing]. Well, I reviewed earlier at least what I perceive as the shifts and changes back and forth. It has now been 18 months or more to make the regulations on the pension accrual; it has taken 18 months or more on the apprenticeship regulations. And on the pension accrual, there are millions and millions and millions of dollars that are being denied to men and women over 65 who should be entitled to those pensions, those accruals. And you are the person responsible as the chief of staff to have seen those regulations implemented.

What is the holdup? Senator Hawkins asked it on the apprenticeship regulations. Now we have an area that affects millions of elderly people, and very clear indication and declaration of policy of the EEOC. You are the fellow who ought to be shepherding that, or coming up and letting us know that you are not getting any action, so that we can help you, and we still have no——

Mr. ZUCKERMAN. Well, on the pension benefit accruals, the action required is that we get this regulatory impact analysis. That is a responsibility of our Office of Legal Counsel and our Office of Program Research, working jointly.

I have urged them, and I believe the Chairman has urged them, to get that analysis done as quickly as possible in order to get this into OMB, on the final track toward publication. It took a while to find someone qualified to do the regulatory impact analysis. I am told that this is a very complex sort of analysis. And we were told that the best the staff could do was to contract with someone where the due date, I guess, is the end of this month.

Senator KENNEDY. Well, I have used more than my time, but if you put that on top of these earlier positions, the changed positions on this, I cannot see on this particular issue how the senior citizens could have much of a sense of confidence that their interests are going to be protected. I do not think it is reasonable to make another conclusion.

Senator METZENBAUM. Mr. Chairman.

The CHAIRMAN. Yes.

Senator METZENBAUM. Senator Simon has an 11 o'clock Rules Committee meeting, and I wonder if we might hear him next. It would be agreeable with me.

Senator QUAYLE. I have just one question.

The CHAIRMAN. Would you defer to him for one, Senator Simon?

Senator SIMON. And I shall be very brief, also.

Senator QUAYLE. OK, if you just have 1, 2 minutes, fine.

The CHAIRMAN. Why don't we go to Senator Simon?

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Senator QUAYLE. I have an 11 o'clock meeting I have got to get to, too, but I do want to make a brief statement and ask a question.

The CHAIRMAN. And we do want Senator Simon in the Rules Committee. He has fought very hard for this committee, and we appreciate it.

Senator SIMON. First of all, there was a discussion of the Stotts case, and let me just by way of background say that that is a layoff case, not a hiring case, as I am sure you are aware.

Mr. ZUCKERMAN. Yes, sir.

Senator SIMON. The question here is not your ability; it is not your integrity. The question, I think, is really posed by Senator Stafford and Senator Kennedy, and that is what your attitude is. And I am concerned on the basis of our conversation yesterday in my office—and I appreciate the courtesy of your stopping by—that you have accepted a view in the affirmative action area that is contrary to the view of the Congress, contrary to the view of previous administrations.

Let us just say that we have a Metzenbaum-Simon company that manufactures cigars for Senator Kennedy. [Laughter.]

Senator KENNEDY. We know where Howard is sitting today; every day, he moves further down.

Senator SIMON. And we employ 1,000 people, all white. One black person applies for a job, then files a complaint. You go, and you litigate that complaint. Are you willing to say to that company, "Let us work out—we are not asking you to hire people who are qualified—but let us see if you cannot employ 20 or 30 black people so that there is affirmative action."

What is your personal belief about whether that should be done or not?

Mr. ZUCKERMAN. We have a statute that is founded on the principle that in making employment-related decisions, race, color, sex, religion and national origin should not be considered at all. It is against the law to consider any of those factors.

I believe with all my heart in that principle. If confirmed as general counsel, I will enforce the law toward achieving in reality that principle as best as I can. To my mind, if you tell an employer that it must hire 20 of any particular group based on one of those factors, you are telling that employer to do exactly what the law says it should not be doing. You are telling that employer specifically to take into consideration race. And that is exactly what this law says an employer should not do.

I say we must require affirmative action of that employer. We must require that employer to go out and make sure that black people—and the odds are, if it was discriminating against blacks, it was also discriminating against other groups, because discrimination tends to go hand-in-hand, whether it is blacks or Mexican-Americans or women. We must force them to go out and make sure that opportunities are made known to the people against whom they have discriminated. And where appropriate, we can require them to provide training programs for people who never before had an opportunity for training.

I cannot, though, accept as consistent with the plain language of the statute, as consistent with the provision that was deliberately added in the Senate which specifically says no court shall order the

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hiring of any person unless that person was discriminated against in violation of this statute. I cannot see how an order that they must hire on the basis of their race 20 people who did not themselves suffer the past discrimination, I do not see how that kind of order is consistent with the statute, with what was said on the floor of the Senate in explaining the statute, and I do not see how that is consistent with the Supreme Court decision in *Stotts*.

Senator SIMON. I am not suggesting that you order this, but in the spirit of the law and in the spirit and tradition of the law—and the law has traditions, and it is not just what it is on its face—is there anything wrong—would you encourage the Commission to sit down with the employer and just informally agree, again, not that they hire people who are not qualified, but that they try and target, to get 20 or 30 blacks or Hispanics or women. You think that is contrary to what should be done.

Mr. ZUCKERMAN. Senator, I think we should set for them as a goal—and not a long-term goal, but an immediate goal, because it was the goal set by the Congress, effective July 1, 1965—that they simply not take into consideration race, color, sex, religion or national origin in any of their employment-related decisions.

Senator SIMON. But they have obviously taken into consideration, and some kind of compensatory action, it seems to me, is desired by society. You do not believe any kind of compensatory action is required.

Mr. ZUCKERMAN. The compensatory action is that every, single individual who suffered that discrimination—and I take a very broad view in terms of who suffers discrimination; I would go to the utmost of what is permitted under the law—we must make sure that every person who suffered discrimination is, as best as we can, put in the place where they would have been but for that discrimination.

I would say we can force this company to break down, to change, to eliminate the systems that it had in place that either led to or effectuated its discrimination. We should enjoin that company in the future from discriminating, because if they discriminate again, we should come down on them with everything at our command, including criminal contempt. And I think if just once, an employer were sent to jail for discriminating, I think that would do more for gaining compliance with the statute than almost anything else we can do at this point.

But I say, Senator, I cannot see how in the name of this statute, a statute founded on the principle that race, color, sex, religion and national origin are irrelevant to a person's qualification for employment, I do not see how we, the Commission, in the name of the statute enacted by this Congress on that basis, can now go to that employer and say, "Take this factor into consideration."

To my mind, that is an inherent contradiction.

Senator SIMON. Thank you.

I thank you, Mr. Chairman.

The CHAIRMAN. Senator Quayle.

Senator QUAYLE. Thank you, Mr. Chairman.

First, I think the record ought to note, Mr. Zuckerman, that your children are very well-behaved, much better than mine or Kenne-

dy's or Hatch's or others would be, under the same circumstances, in particular. I wanted the record to show that.

The CHAIRMAN. Well, I concur in that, especially seeing the Quayle and Kennedy children.

Senator METZENBAUM. I am prepared to vote to confirm the children. [Laughter.]

The CHAIRMAN. That is typical of Senator Metzenbaum.

Senator QUAYLE. Let's vote.

Mr. Chairman, just having gotten into this and listening to some of the testimony here today, I do not believe that the issue before this committee ought to be to try to penetrate and figure out exactly what all the subtle opinions and philosophies may be. There are a lot of different approaches and different philosophies and different opinions on these issues.

There seems to be a feeling, at least by some people, that Mr. Zuckerman will somehow toy with or try to change the law or flout the law. I think, at least I am getting that kind of feeling, sitting here.

And, I think, what we ought to do is to assess whether, in fact, he will try to tinker with the law. And, I believe, that that is a burden that this committee has, and, I think, that is the burden that Mr. Zuckerman has. And I would hope that we would focus on that particular issue as we try to resolve the situation of whether Mr. Zuckerman should or should not be confirmed.

Therefore, I think that the pertinent question would be to see how he, in fact, is going to enforce the law, not whether he is or not; of course he is. I think the question is how is he going to go about this, and if, in fact, he can convince this committee if he is going to effectively carry out what the law is when Congress makes the law and the President signs it, then he ought to have our affirmative judgment. If there is a question that he is not going to enforce the law, and somehow he is going to tinker with it or try to fine tune it to his own particular philosophy or opinion, that may be a divergence of what the majority of this committee or the majority of the Senate is perceived to be, well, then, that is another question.

What kind of a strategy will you use and how will you implement the vigorous enforcement of the EEOC laws? What is your strategy to get the enforcement of these laws—not whether you are going to enforce the law or not; you have got to enforce it; that is going to be your job if you are confirmed—but how are you going to go about doing it?

Mr. ZUCKERMAN. There is a whole investigative side of the Commission, there is a voluntary compliance side, and, I think, all those efforts are critical to securing compliance.

Once a matter gets to the general counsel, however, by definition it is a situation where there was not voluntary compliance and there was a failure of conciliation. At that point the general counsel takes over. And it is my view that we must establish through litigation that if an employer discriminates, it is going to cost that employer; we are going to make it cost until it hurts, so that employers will get the message once and for all that they had better cut it out and stop taking these factors into consideration before they take any employment decisions.

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First, we have to file these cases. I think the Commission made a giant step forward with the enforcement policy it adopted a little less than 1½ years ago, that essentially says we will litigate every case where we find discrimination occurred and there has been a failure of conciliation. No more like in the past, when the Commission would decide that discrimination had occurred, but it was not worthy of EEOC's attention. The only reason we exist is to pay attention to and to fight against discrimination. All discrimination that occurs is worthy of litigation. It is why we are there. It is why the general counsel exists. It is why the 270-odd lawyers of the Office of General Counsel have their jobs, is to litigate when discrimination occurs.

We have the resources to do a lot more. As the chairman pointed out early on today, the caseloads for our attorneys are far below what they are capable of doing, far below what I believe they are ready, willing, and eager to do. We need to give them the cases. I think the general counsel has to stay on top of them to make sure that the cases are prosecuted. We have to make sure that we do not get tied up in all sorts of discovery. We have to make sure that after a case is filed, it does not just get put on the shelf with no further attention.

Time is an enemy of the people who suffer discrimination, and time should not be allowed to run while we dally. We have to prosecute these cases vigorously, and bring them to conclusion as quickly as we can.

We need to investigate. We simply have to make sure we have the evidence we need to win the cases. We just had this total loss in the *Sears* litigation—a massive case brought by the Commission, with enormous resources devoted to that case—and we lost it on every point considered by the court.

We cannot let that happen. We have to make sure that when we go forward, we have got the facts we need to win the case, and we have to prosecute the cases in order to win.

We must establish the point:

> Listen out there, you companies, you labor organizations, there has been a law against discrimination on the books for 20 years. You may have thought that we were not taking it seriously, and so you may not have taken it seriously. But guess what—you are wrong. We take it very seriously. And you either comply, or else we are going to come down on you hard.

We have got to get that message across to the business world of America, so that once and for all they will get it through their heads that these factors, the five factors of title VII, the age factor of the Age Discrimination in Employment Act, simply should not be considered by them in their employment decisionmaking. I believe that vigorous, thorough litigation is critical to getting that message across, and it is precisely that kind of enforcement that I would hope to achieve and continue to move toward if confirmed as general counsel.

Senator QUAYLE. I can only say in conclusion, and then I must go, that that to me is the key; what kind of a strategy you are going to be able to come up with in convincing that you, in fact, will have the vigorous enforcement of the EEOC laws. And, I believe, that the answer that you have given just now is the best

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answer that I have heard in the 45, 50 minutes that I have been here.

Senator METZENBAUM. Well, may I say to my colleague from Indiana that we are in the business of making speeches—sometimes they are good speeches, and sometimes they are not such good speeches—but in the last analysis, the real judgment of a U.S. Senator is on the basis of how he or she votes on the floor of the Senate or in committee. And, I think, in the same situation, this man has been in office for 18 months, and it is interesting—you will not be here—but I am prepared to indicate that the Legal Defense Fund of the NAACP, the Puerto Rican Legal Defense Fund, the Mexican-American Legal Defense Fund, the Asian-American Legal Defense Fund spell out the problems that they have had with this nominee since he has been in office in 18 months.

In fact, I would say that to the best of my recollection, he has accumulated as strong a group of opposition in a short period as almost anybody I know who has held public office. And their concern is that he is not willing to enforce the law, that he has not been an advocate of enforcement in the 18 months that he has been in the position, and that they are not going to get anything different.

And if you noticed the exchange between him and Senator Simon, and you read between that exchange, you had to come to the conclusion that he talks about the question of goals, but the question of how you get there, which is your question, Senator, on that one his position is very nebulous, and you do not get there.

Senator QUAYLE. Well, I would think that obviously, you have got some information there that Mr. Zuckerman is going to respond to, and, I think, that he would certainly welcome it.

The only thing that I would say to Senator Metzenbaum is that as we go through these things, again, I believe, it is the question that I have just asked, that we have got to be convinced that you are going to get a vigorous enforcement of the law——

Senator METZENBAUM. I agree.

Senator QUAYLE [continuing]. I think, that that is the issue before this commitee. I do not believe it is an issue of what a various opinion or philosophy may be, because we all have different opinions. We make good speeches, and we have got a lot of interest groups that are interested in a lot of different things. We have got as many interest groups as we do speeches, almost.

But anyway, the point is are we going to be convinced, and, I think, that is certainly the question that I was sitting here listening for today, and that is why I wanted to go back and forth to get a feel for this.

Senator METZENBAUM. Did you hear Senator Kennedy's inquiry?

Senator QUAYLE. I listened to that, but I think we have got to go back again to what this thing is, that he is going to have to convince this committee and essentially the Senate that he in fact is going to enforce these laws. I believe that you will have every right, and should, to bring up these things that question his commitment not to his own personal philosophy, and not to his opinion or your opinion, but the commitment to what the law of this land is.

That is why I asked the question what is the strategy that he is going to have, and he has just spelled it out, and as I said, I thought it was the best answer that he has given in the last 50 minutes, but he is going to have more time with you and a lot of others. But unfortunately, I have got to go. This is getting more interesting, but I am already 10 minutes late with Senator Goldwater, and all of you know you are not late to Goldwater's meeting; I will get in a lot more trouble being late for Goldwater than with you, Howard. [Laughter.]

The CHAIRMAN. I am going to remember that.

Senator Metzenbaum.

Senator METZENBAUM. Mr. Zuckerman, I will shortly put into the record the letters from these four groups. But running through each of these letters is the fact that they have met with you, and the problems that they have had.

The Legal Defense Fund indicates that in fact they have serious reservations and deep concern about your nomination. They say:

> On the basis of the information which is available to the Legal Defense Fund, we are of the firm opinion that Mr. Zuckerman would impose positions on the operation of the General Counsel's Office which are contrary to the civil rights laws and which would be inconsistent with congressional intent in the enactment of those laws.

The Puerto Rican Legal Defense and Education Fund opposes your confirmation, and they say:

> We urge you and the other honorable members of the committee to carefully scrutinize this appointment. Mr. Zuckerman, we believe, will use this position to turn around two decades of EEOC work and undermine the intent of the civil rights laws that he would be charged with enforcing. Mr. Zuckerman met with a member of my staff, and while he refused to disclose what written positions he may have taken as chief of staff, the positions he took at that meeting revealed an antagonism to strong enforcement of the civil rights laws. He denied it would be his job to be an advocate for civil rights. Rather, he seemed to believe that the laws currently were being interpreted too broadly by the courts.

The Mexican-American Legal Defense Fund opposes your nomination, and they say:

> Based upon three face-to-face discussions with him about his plans in EEO policy areas, his declining to respond to a written inquiry on specific EEO policy issues, and our own review of other relevant public statements by Mr. Zuckerman, I must conclude that the enforcement of equal employment laws can be more vigorously pursued by another candidate.

And the Asian-American Legal Defense Fund opposes your confirmation, and they say:

> Recent statements by Mr. Zuckerman indicate a disagreement with the principles of the current fair employment laws and an unwillingness to comply with current executive, judicial, or legislative interpretations of these laws that disagree with his own views.

Mr. Chairman, I ask unanimous consent that the entire text of these four letters be included in the record.

The CHAIRMAN. Without objection.

[Information supplied follows:]

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Asian American Legal Defense and Education Fund
99 Hudson Street, 12th Floor, New York, N.Y. 10013 • (212) 966-5932

February 28, 1986

Senator Howard M. Metzenbaum
140 Senate Russell Office Building
Washington, D.C. 20510

Re: Confirmation of Jeffrey Ira Zuckerman as EEOC General Counsel

Dear Senator Metzenbaum:

On behalf of the Asian American Legal Defense and Education Fund (AALDEF), a non-profit organization which has advocated for the legal rights of Asian Americans for over a decade, I am writing to express my concern about the pending nomination of Jeffrey Ira Zuckerman to the position of General Counsel of the Equal Employment Opportunity Commission. I have worked on equal employment issues on behalf of Asian Americans since 1977 and also had an opportunity to meet with Mr. Zuckerman last week. Based on this background, I am firmly convinced that the best interests of the Asian American community would not be served by Mr. Zuckerman's appointment as General Counsel.

Here are the reasons for this conclusion:

* The General Counsel of EEOC is responsible for enforcing numerous federal laws that have a significant impact on Asian Americans, including Title VII of the Civil Rights Act of 1964, the Equal Pay Act and others;

* The General Counsel of EEOC has considerable discretion in choosing the strategies and cases, such as those affecting Asian Americans in the area of affirmative action, which will be pursued on behalf of the EEOC in the federal courts;

* In the past eighteen months while Mr. Zuckerman has been EEOC Chief of Staff, the Acting General Counsel of EEOC has exercised unilateral authority in undermining two decades' worth of affirmative action policies by informing EEOC regional attorneys not to submit any cases which included affirmative action goals or timetables and by arguing in Local 28, Sheet Metal Workers v. EEOC (Nos. 84-1656 and 84-1999) against goals for hiring and training minority construction workers.

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* Recent statements by Mr. Zuckerman indicate a disagreement with the principles of the current fair employment laws and an unwillingness to comply with current executive, judicial or legislative interpretations of these laws that disagree with his own views.

* Writen analyses of the fair employment laws, prepared by Mr. Zuckerman during his brief eighteen-month tenure at EEOC, have been made available only to Senate staff and therefore preclude a more detailed analysis of Mr. Zuckerman's positions.

In closing, let me add that while AALDEF disagrees with Mr. Zuckerman's views on equal employment law, we reaffirm our commitment to his right to express those views. However, if Mr. Zuckerman seeks to implement these views, he should seek legislative reform through the Congress. Otherwise, his confirmation as General Counsel would give him the power unilaterally to turn back the clock on decades' worth of bipartisan efforts toward providing equal employment opportunity for Asian Americans and for all Americans.

Very truly yours,

Stanley Mark

Stanley Mark
Program Director

SM/mf

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Mexican American
Legal Defense
and Educational Fund

1701 18th Street, N.W.
Washington, D.C. 20009
(202) 393-5111

MALDEF

February 27, 1986

Hon. Howard Metzenbaum
U.S. Senate
Washington, D.C. 20510

Dear Senator Metzenbaum:

On behalf of MALDEF, the Mexican American Legal Defense and Educational Fund, I wish to express our serious concerns regarding the nomination of Jeffrey I. Zuckerman as General Counsel to the Equal Employment Opportunities Commission.

Based upon three face-to-face discussions with him about his plans in EEO policy areas, his declining to respond to a written inquiry on specific EEO policy issues, and our own review of other relevant public statements by Mr. Zuckerman, I must conclude that the enforcement of equal employment laws can be more vigorously pursued by another candidate. Mr. Zuckerman opposes the use of statistical methods of finding discrimination, including the use of the 80% Rule now part of the Uniform Guidelines on Employee Selection Procedure. He also opposes the use of goals and timetables as a remedy for past and present employment discrimination. Even though goals and timetables have been upheld by six circuit courts of appeal interpreting the Stotts decision and Executive Order 11246 remains current law, Mr. Zuckerman has endorsed Acting General Counsel Butler's abandonment of that civil rights protection remedy. The General Counsel directive was not approved by the Commission and as such constitutes policy-making outside of the Administrative Procedures Act. Even leaving aside this inherent procedural flaw, the Zuckerman/Butler stance may even contradict the ethical duty of a member of the Bar to pursue all available remedies and means to enforce the law.

There are a number of other difficulties we have with this nomination. MALDEF's decision to oppose this nomination was not made lightly. If possible, I would like to meet with you or a member of your staff prior to the hearing scheduled March 4. In addition, I strongly urge you to attend the hearing so that you will be able to hear Mr. Zuckerman's views directly as have I. In so doing, I hope you will then share our conclusion that vigorous enforcement of this nation's civil

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rights laws as historically supported by Democrats and Republicans alike is better left to a different nominee.

Sincerely,

G. Mario Moreno
Associate Counsel

GMM/ga.

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PUERTO RICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
99 Hudson Street
New York, New York 10013
(212) 219-3360

February 28, 1986

Senator Howard M. Metzenbaum
140 Senate Russell Office Building
Washington, D.C. 20510

Re: Confirmation of
Jeffrey Zuckerman for
EEOC General Counsel

Dear Senator Metzenbaum:

The Puerto Rican Legal Defense and Education Fund is a national civil rights organization dedicated to protecting and furthering the civil rights of Puerto Ricans and other Hispanics. It has a long history of involvement in equal employment opportunity matters. In the past, it has relied on the judgment of the President to choose the General Counsel and the Commissioners of the Equal Employment Opportunity Commission and, although we may have had philosophic differences with some of the selections, we have not opposed anyone. However, now for the first time, we believe it important to speak out against the confirmation of Jeffrey Zuckerman for the position of General Counsel

We urge you and the other honorable members of the Committee to carefully scrutinize this appointment. Mr. Zuckerman, we believe, will use his position to turn around two decades of EEOC work and undermine the intent of the civil rights laws that he would be charged with enforcing. Mr. Zuckerman met with a member of my staff and, while he refused to disclose what written positions he may have taken as Chief of Staff, the positions he took at that meeting revealed an antagonism to strong enforcement of the civil rights laws. He denied it would be his job to be an advocate for civil rights. Rather, he seemed to believe that the laws currently were being interpreted too broadly by the courts.

Furthermore, Mr. Zuckerman lacks any EEOC litigation experience. He has only been with the Commission for a year and half and has not been involved in the actual litigation of cases. Someone without experience should not be placed in charge of the litigation of the EEOC docket.

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CONTRIBUTIONS ARE TAX DEDUCTIBLE.

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Senator, we call on you to use the powers of the Committee to closely review with Mr. Zuckerman his positions on equal employment opportunity. We believe, after such a review, you will agree that the Committee must take the exceptional step of denying confirmation.

Respectfully,

Linda Flores/LF

Linda Flores
President

LF/bm

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L D F
Legal Defense Fund

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, New York, N.Y. 10013 • (212) 219-1900

806 Fifteenth Street, N.W., Suite 940
Washington, D.C. 20005 • (202) 638-3278

February 25, 1986

Honorable Howard M. Metzenbaum
140 Senate Russell Office Building
Washington, D.C. 20510

Re: Confirmation of Jeffrey Ira Zuckerman

Dear Senator Metzenbaum:

Mr. Jeffrey Zuckerman has been nominated for the position of General Counsel of the Equal Employment Opportunity Commission. The NAACP Legal Defense & Educational Fund, Inc., has serious reservations concerning the confirmation of Mr. Zuckerman. Mr. Zuckerman has prepared numerous written analyses of his positions regarding the appropriate enforcement of the fair employment laws. But, as we describe below, these documents are only available to the Senate staff. On the basis of the information which is available to the Legal Defense Fund, we are of the firm opinion that Mr. Zuckerman would impose positions on the operation of the General Counsel's office which are contrary to the civil rights laws and which would be inconsistent with Congressional intent in the enactment of those laws. If, as we believe, Mr. Zuckerman disagrees with the fundamental purposes of these laws then he should attempt to change these laws through the Congress. If our opinion of Mr. Zuckerman is confirmed by the testimony during the March 4 hearing, then Mr. Zuckerman should not be placed in the one position in the federal fair employment enforcement agencies, the General Counsel of the EEOC, where he could unilaterally reverse legal and policy positions.

Since, as of yet, we have not had a complete opportunity to review Mr. Zuckerman's positions, it is essential that the Committee question Mr. Zuckerman fully on the important aspects of the fair employment laws, Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act, Equal Pay Act, and Rehabilitation Act, for which the General Counsel has substantial enforcement authority.

The General Counsel of the Equal Employment Opportunity Commission has the responsibility for conducting the litigation in the hundreds of cases filed on behalf of the Commission in the federal courts. The General Counsel is in a critical position to affect civil rights policy and the enforcement of the laws by taking positions in briefs before the courts. Recently, we have witnessed

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The NAACP LEGAL DEFENSE & EDUCATIONAL FUND is not part of the National Association for the Advancement of Colored People although it was founded by it and shares its commitment to equal rights. LDF has had for over 25 years a separate Board, program, staff, office and budget.

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examples of the power of the General Counsel. In the Fall of 1985, the Acting General Counsel informed EEOC regional attorneys that they should not submit any cases which included affirmative action goals or timetables. In December 1985, the Acting General Counsel signed a Supreme Court brief arguing that it was illegal for the district court and the appellate court to impose a 29% goal for the hiring and training of Black and Hispanic workers by a construction union which had intentionally excluded minorities for many years. Local 28, Sheet Metal Workers v. EEOC, Nos. 84-1656, 84-1999.

The Acting General Counsel took these unilateral positions even though it has been the consistent policy of the EEOC under both Republican and Democratic Administrations to use affirmative action goals, and the EEOC presently maintains Guidelines which encourage employers to use affirmative action goals. Moreover, in July 1984 the EEOC argued before the appellate court that the 29% goal in the Sheet Metal Workers case was a lawful and necessary remedy. Finally, the Commission never voted or even considered whether it should reverse its position in the Sheet Metal Workers case or its general support of the use of affirmative action goals.

We respect the authority and discretion of the President to nominate persons to positions in administrative agencies. In fact, the LDF has never opposed the nomination of a single person to the office of General Counsel or Commissioner of the EEOC in the twenty-year history of the agency. However, as you well know, the confirmation process is also essential. It must be used when necessary in order to insure that the laws will be effectively enforced as Congress intended and as the courts have interpreted.

Prior to Mr. Zuckerman joining the EEOC in August 1984 as Chief of Staff, he had no experience in the area of civil rights. Thus, our analysis of Mr. Zuckerman's positions is based upon the actions which he has taken at EEOC and his statements during the confirmation process.

As set forth in his letter of October 21, 1985, to Senator Kennedy, Mr. Zuckerman has prepared a significant number of written analyses of the fair employment laws during his 18 months at the Commission. Unfortunately, we have not been able to analyze these documents because the documents have only been made available by the EEOC to the Committee staff. Accordingly, it is critically important that the Members of the Committee question Mr. Zuckerman regarding the positions which he has taken at the EEOC. You and Senator Dodd made an excellent start by examining Mr. Zuckerman at the December 10 hearing on several positions which he took on the Age Discrimination in Employment Act.

Mr. Zuckerman has demonstrated disagreement with the principles of the fair employment laws and an apparent willingness to act on the basis of his own views rather than the interpretation of the EEOC under Republican and Democratic administrations, the courts, and the Congress. We think that the record establishes Mr. Zuckerman's

disagreement with and hostility to current law and we expect that a thorough examination of the positions which he has taken at the EEOC would confirm our interpretation. Of course, we shall closely monitor the hearing scheduled for March 4 and any subsequent hearing, and we will review our position in the light of any further information or statement of positions by Mr. Zuckerman.

In order to explain more fully our position on Mr. Zuckerman, we give three examples of positions taken by Mr. Zuckerman.

In February 1985 Chairman Thoams submitted to OMB an "Overview" of the planned EEOC regulatory agenda. Mr. Zuckerman has indicated his support for the positions in the Overview, which was prepared, as we understand, under his supervision as Chief of Staff. In particular, the Overview criticized the Uniform Guidelines on Employee Selection Procedures. The "Overview" asserted that the Guidelines applied "mechanical statistical rules," "assume some inherent inferiority of blacks, Hispanics and women," and depart from the "plain meaning of discrimination." Contrary to the statements in the Overview, the Guidelines are premised upon the continuing legacy of racial discrimination and cultural and educational deprivation in our society, and they demonstrate the need for close investigation of any selection procedure which disproportionately excludes minorities or women in order to insure that the procedure is necessary for the selection of qualified employees.[1/] The maintenance of the principles in the Guidelines is essential to the effective enforcement of the fair employment laws.

Second, Mr. Zuckerman opposes the use of affirmative action goals for remedying discrimination. Moreover, he supports the Acting General Counsel's unilaterial reversal of the well-established EEOC position supporting affirmative action goals. The EEOC has recognized for over a decade and through four administrations the necessity for numerical objectives for affirmative action. The courts have agreed with the established EEOC position. Mr. Zuckerman should not be placed in a position to impose unilaterially his opposition to affirmative action goals which have so effectively served to break down barriers to equal employment opportunity.

1/ The NAACP Legal Defense Fund has submitted lengthy congressional testimony on the Uniform Guidelines and the criticisms of the Guidelines set forth in the "Overview." Statement of Patrick O. Patterson on Equal Employment Opportunity Policy and Law on behalf of the NAACP Legal Defense & Educational Fund, Inc. before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, October 2, 1985. If requested the LDF will be happy to make this statement available to the staff of the Committee.

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Honorable Howard M. Metzenbaum
February 25, 1985
Page four ...

Third, Mr. Zuckerman's testimony regarding the Age Discrimination in Employment Act reflects his disagreement with basic fair employment principles. Mr. Zuckerman testified that if done with a "benign" intent employers could layoff workers on the basis of their eligibility for retirement without violating the Age Act. As might be expected, the EEOC has consistently taken the opposite position and the courts have rejected Mr. Zuckerman's position. In fact, it is difficult to consider a practice which involves more age discrimination than a layoff based upon eligibility for retirement. Since the policies of the fair employment laws and even the language of the statutes are so similar, the antipathy shown by Mr. Zuckerman to those protected by the Age Act has a strong bearing on his likely interpretation of the other fair employment laws.

We appreciate your careful consideration of the important civil rights issues related to the confirmation of Mr. Zuckerman. We would be pleased to respond to any questions which you may have.

Very truly yours,

LeVonne Chambers
Director Counsel, NAACP Legal
Defense & Educational Fund, Inc.

Senator METZENBAUM. Mr. Zuckerman, I think it would be unfair of me not to give you an opportunity to comment. But how do you account for the fact that these four legal defense funds concerned about the rights of minorities, that each of them has seen fit to send a letter indicating their opposition—and it is my understanding that some organizations are in the process of doing the same—in an 18-month period, how do they all come to conclude that you were not going to enforce the laws of this country?

Mr. ZUCKERMAN [pause]. Let me say at the outset, I have seen only two of the four letters. I have not even seen the letters from the—you say there is one from the Asian-American Legal Defense and Education Fund, and one from the Puerto Rican Legal Defense and Education Fund——

Senator METZENBAUM. That is right.

Mr. ZUCKERMAN. I have not even seen those. I have seen the other two. I do not have them with me.

Senator, I cannot say how they came to whatever conclusion they came to. Only they can say how they came to it. I would say, Senator, I sat down and met fairly recently with representatives of a number of groups including the Asian-American Legal Defense and Educational Fund and the Puerto Rican Legal Defense and Educational Fund. That was the first and only time I have sat down and met with them. I would say the critical point of disagreement at our meeting was on the question of whether it is appropriate to seek in relief preferences for people who did not themselves suffer discrimination, to seek preferences for such people on the basis of their race, color, sex, religion, or national origin.

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I will say in every meeting I have had with any of these groups, that was always the point on which there was the greatest and most significant disagreement.

Senator Metzenbaum, you have heard, as I said to Senator Simon, my view that it is contrary to the fundamental principle of the statute, contrary to the specific language of the statute, contrary to the language as interpreted by the Supreme Court in *Stotts*, to require employment decisionmaking on the basis of one of the prohibited factors. That is, I realize, a fundamental disagreement between myself and a number of these groups. I appreciate it is a disagreement between myself and at least some members of this committee.

It is also an issue which is currently, as I mentioned before, pending before the Supreme Court. The Supreme Court will give a definitive ruling, hopefully, on what is the law under title VII.

I will say, Senator, I respectfully submit that notwithstanding and indeed in light of my fundamental commitment that that type of action is contrary to the statute, my opposition to such preferences arises precisely out of my whole-hearted, unquestioned support for the fundamental principle of these statutes: that race, color, sex, religion, national origin, and age simply are not factors to be taken into account by employers.

Those are the statutes. There are certain fine points of the statutes which are extremely important. But the fundamental principle is that a person should be considered on the basis of what they are capable of doing. And I will enforce the law as fully and as completely as I can in accordance with the statutes, in accordance with everything that this Congress wanted in the statutes, in accordance with everything that the Supreme Court has said these statutes are all about. And I will do so without hesitation, and with a great deal of pride and pleasure.

Senator METZENBAUM. The last time you were here, I raised the issue with you concerning the *Stotts* case and the fact that the three circuit courts of appeals had come to a total contrary conclusion with respect to the interpretation of that case that you did, and yet you thought it was Zuckerman against the three circuit courts of appeal.

You stated at that time that when one circuit court of appeals resolves an issue, the decision is controlling within that circuit. In other words, if the third circuit decides that an employer's layoff action based on eligibility for retirement is unlawful under the ADEA, you, Zuckerman, abide by that ruling within the third circuit, although you may challenge it elsewhere. Wasn't that your position?

Mr. ZUCKERMAN. What the court of appeals rules is the law of the circuit. Wherever the United States is acting as an enforcement agency—the Supreme Court has addressed this very question—the United States, in this case, the EEOC, must look at the law, and decide whether it agrees with the court of appeals decision or whether it disagrees with the court of appeals decision.

If it disagrees with the court of appeals decision, the Government has the right, indeed, the obligation, to adhere to its interpretation of the statute, and where appropriate, seek to vindicate its position in court.

Senator METZENBAUM. Three circuit courts of appeals rule one way in interpreting that decision. Zuckerman says, "I do not pay any attention to those unless it is in that circuit." Is that right?

Mr. ZUCKERMAN. No, sir.

Senator METZENBAUM. Well, that is what you told me last time.

Mr. ZUCKERMAN. No. They should be paid attention to no matter what circuit. The reasoning of the Court should be considered, and attention should be paid to the Court's decision. The Commission—and it is not Zuckerman as general counsel, or as advisor to the chairman, in either position that Zuckerman decides—the Commission must review the issue and determine its position. The Commission has the enforcement responsibility.

Senator METZENBAUM. I am talking about Zuckerman now. Never mind the Commission. You told me last time, "What a court of appeals says is the law is similarly the law within that circuit, unless and until again either this body changes it."

I then pressed you on the point of isn't that the law of the whole land, when three circuit courts of appeals have ruled in a particular manner, and you still determined that you were going to go to the contrary point of view, elsewhere.

Mr. ZUCKERMAN. It is not that I decide, Senator. I want to keep this straight, that it is the Commission that decides what the law means. That is a determination by the Commission.

Senator METZENBAUM. I am not talking about the Commission. I am not asking about the Commission.

Mr. ZUCKERMAN. But they are the ones who make that decision.

Senator METZENBAUM. I just want to know Zuckerman, on Zuckerman.

The CHAIRMAN. Would you yield for a second, Howard? I think that is a good point. The Commission does make some of these decisions. He is the attorney for the Commission. The fact of the matter is that even if three circuit courts decide one way, that does not mean that is absolutely the right way, and he has an obligation to advocate the Commission's position.

Now, if he believes that position, that augments that obligation. You and I may differ with his position——

Senator METZENBAUM. I very much respect my chairman, but——

The CHAIRMAN [continuing]. But three circuit courts of appeal do not determine the law for all circuits in the country.

Senator METZENBAUM. Well, if the chairman wishes to debate legal issues with me, I will be happy to do it with him in the Supreme Court, the circuit court of appeals, or in this committee.

The CHAIRMAN. You are going to learn that three circuits do not control all the circuits.

Senator METZENBAUM. But at this moment, you are not up for confirmation, and Mr. Zuckerman is, and I would like to stay with Mr. Zuckerman, if I could.

The CHAIRMAN. I understand. But let us be fair about it, because in all honesty, he can take a contrary position until the Supreme Court rules. Any attorney can.

Senator METZENBAUM. The Supreme Court has ruled. The Supreme Court has ruled. That is the whole point. And the three circuit courts of appeals have supported that interpretation.

Mr. Zuckerman takes a contrary position.

Let me ask you another question, Mr. Zuckerman. Does your position mean that as general counsel, you would authorize a lawsuit against an employer in the circuit court who acted in a manner that we have been talking about?

Mr. ZUCKERMAN. Senator, this is why I wanted to clarify. The general counsel does not authorize litigation. That is a function of the Commission, and the Commission alone has the authority to authorize litigation.

Senator METZENBAUM. But isn't it true that the case discussed in your document No. 4 which we examined at the last hearing arose in the third circuit, and you still recommended to the Commission that the action be dismissed if the employer acted on the basis of eligibility for retirement?

Mr. ZUCKERMAN. If we are going back to that case, my recommendation was, looking at the facts there, that it was just cold discrimination on the basis of age. These people were fired because the employer decided, "We are going to lay off someone; let us get rid of the old people." And that is why I recommended to the chairman that he vote to authorize litigation.

Senator METZENBAUM. You recommended what?

Mr. ZUCKERMAN. I recommended that the chairman vote to authorize litigation. The staff also raised questions about adverse impact and about retirement eligibility. I referred to those in my memo and suggested that if retirement eligibility was the basis, the general counsel should be told to dismiss the case there.

But understand it is the Commission that has to decide what is the correct interpretation of the law, and has to authorize litigation on the basis of its conclusion as to what is the correct interpretation. The general counsel then prosecutes that litigation.

Senator METZENBAUM. Mr. Zuckerman, commissions normally look to their general counsel to tell them what is the correct law, or they look to the Chief of Staff—in this case, you were the Chief of Staff at that time. And yet the fact is, you are now appearing before our committee suggesting that all these decisions were made by the Commission. And I am indicating to you that I am concerned about your recommendations to that Commission, and that is the problem that concerns me, because your recommendations appear to be contrary to what the law was at that time, based upon the Supreme Court and the circuit court of appeals decisions.

Mr. ZUCKERMAN. I would ask the Senator what Supreme Court decision does he have in mind?

Senator METZENBAUM. The circuit court of appeals decisions, not the Supreme Court, but the circuit court of appeals decisions.

Mr. ZUCKERMAN. I think we have discussed this. When the court of appeals rules, the Government enforcement agency takes into consideration the court of appeals decision; if it agrees with the court of appeals decision—that it is the correct interpretation of the law—then the agency enforces the law in accordance with the decision, throughout this country. If the agency concludes, however, that the court of appeals decision is incorrect, and the agency intends to seek to have its contrary interpretation upheld by other courts of appeals and ultimately by the Supreme Court, then in

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that case the agency is dutybound, it is its responsibility, to seek to have the law interpreted correctly as it sees it.

I gave as another example last time this whole question about the Commission's authority to enforce the Age Discrimination in Employment Act, which was questioned by the second circuit.

Senator METZENBAUM. Mr. Chairman, I have further questions, but Senator Dodd has a time commitment.

The CHAIRMAN. We will be happy to turn to you, Senator Dodd.

Senator DODD. I thank my colleague from Ohio, and I want to thank you. You responded in a letter regarding the disparate impact on the ADEA issue. This follows directly along the lines of what Senator Metzenbaum is raising this morning.

I will submit, Mr. Chairman, if I can, some questions pertaining to that particular issue, and I apologize to the committee and to the witness for having to run off.

The CHAIRMAN. We appreciate it. We will keep the record open through the end of today for any committee member to submit questions.

Thank you, Senator Dodd.

Senator DODD. Thank you.

Mr. ZUCKERMAN. I will be happy to respond as quickly as I can, Senator Dodd.

[Information supplied follows:]

1217 North Belgrade Road
Silver Spring, Maryland 20902

February 13, 1986

The Honorable Christopher J. Dodd,
United States Senate,
Washington, D.C. 20510.

Dear Senator Dodd:

At the December 10, 1985, hearing before the Committee on Labor and Human Resources on my nomination to serve as General Counsel of the Equal Employment Opportunity Commission, you requested that I submit comments concerning (1) the decision in Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983), and (2) an April 1985 memorandum to the Commission from its Acting General Counsel, Johnny J. Butler. Mr. Butler's memorandum recommended that the Commission institute litigation against a certain company for violation of the Age Discrimination in Employment Act ("ADEA"). I am pleased to submit this letter in response to your request.

You made your request in the context of questions concerning whether the "disparate impact" theory of discrimination is a viable means for proving violations of the ADEA. Accordingly, I feel that before turning to the Leftwich decision and Mr. Butler's memorandum, I should discuss generally the disparate impact theory of discrimination and its relationship to the "disparate treatment" theory of discrimination, as those theories have been developed in litigation under Title VII of the Civil Rights Act of 1964. Perhaps the best single source for this is the Supreme Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977):

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve

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> employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Either theory may, of course, be applied to a particular set of facts. [Citations deleted.]

The two theories can be entwined: where an employer applies a facially neutral standard that has a disparate impact upon a particular group, it may be appropriate, depending upon all the other relevant facts and circumstances, to infer that the employer intended to discriminate against that group, and thus establish a violation under the disparate treatment[5] theory of discrimination. This application of disparate impact should certainly be available in litigation under the ADEA. This is not, however, the usual use of disparate impact in Title VII litigation. Therefore, for the balance of this letter, as I discuss the applicability of the disparate impact theory of discrimination in ADEA litigation, I shall be referring to the theory as it is commonly applied in Title VII litigation, i.e., to establish a violation without proof of any intention to discriminate.

The plaintiff in Leftwich was a professor who had lost his job in the course of the transfer of control of Harris-Stowe College from the St. Louis Board of Education to the Missouri state college system. The faculty was reduced from 51 members to approximately 34, with some of the "new" positions reserved for tenured faculty from the "old" city college, and some reserved for nontenured faculty from that school. The court of appeals found that the defendants had violated the ADEA in not hiring the plaintiff for the "new" state college, holding:

> To establish a prima facie case of age discrimination under a disparate impact theory, a plaintiff need not show that the employer was motivated by a discriminatory intent; he or she need only demonstrate that a facially neutral employment practice actually operates to exclude from a job a disproportionate number of persons protected by the ADEA.

702 F. 2d at 690.

Turning to Mr. Butler's memorandum, the proposed defendant had conducted a reduction-in-force, and there was evidence that

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its president had set a policy of retaining the employees with little seniority because they were being paid minimum wages and received few benefits. Mr. Butler urged that the company be sued for violation of the ADEA under a disparate impact theory.

Neither the Leftwich decision nor Mr. Butler's memorandum discussed either the legislative history of the ADEA or section 4(f)(1) of the Act in analyzing the extent to which the disparate impact theory of discrimination is applicable in ADEA litigation. I believe, however, that both the legislative history and section 4(f)(1) may have important implications in this regard.

Turning first to the legislative history of the ADEA, one noted commentator has concluded:

> The legislative history of the ADEA is clear. The ADEA is based on a report prepared by Secretary of Labor W. Willard Wirtz . . . . The Report clearly and unambiguously recommended a prohibition on rigid age limits based on stereotypes of aging. It went no further. In fact, it made clear that practices which affected older workers "more strongly" than younger workers should not be prohibited by law. Congress intended to implement the conclusions in the Report. The Courts should respect this intention by interpreting the ADEA, to prohibit only those actions based on an intent to discriminate because of age.

Blumrosen, "Interpreting the ADEA: Intent or Impact," in Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 68, 114-15 (M. Lake ed. 1982). */

By definition, if Congress intended "to prohibit [under the ADEA] only those actions based on an intent to discriminate because of age," it did not intend to permit application of

*/ The report by Secretary of Labor Wirtz to which Professor Blumrosen referred -- The Older American Worker: Age Discrimination in Employment -- was prepared and submitted to Congress in response to section 715 of the Civil Rights Act of 1964, which directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." Section 715 further directed the Secretary

(footnote continues on next page)

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the disparate impact theory of discrimination in ADEA litigation, for that theory is directed to situations where there is no intent to discriminate. Thus, if Professor Blumrosen's interpretation of the legislative history of the ADEA is correct, the disparate impact theory of discrimination should not be applicable in ADEA litigation. **/

Section 4(f)(1) of the ADEA also is relevant to the question of whether the disparate impact theory of discrimination is applicable in ADEA litigation. It provides, in relevant part:

> It shall not be unlawful for an employer, employment agency or labor organization . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age.

Section 4(f)(1) does not have any general counterpart in Title VII. There is, however, a similar provision in the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1), which is incorporated by reference into Title VII, but only with respect to sex-based wage discrimination, 42 U.S.C. §2000e-2(n). The Equal Pay Act and Title VII require that men and women be paid equal wages for equal work, but the provision to which I refer permits the payment of unequal wages for equal work "where such payment is made pursuant to . . . a differential based on any . . . factor other than sex." In County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981), the Supreme Court indicated that this "factor other than sex" language would preclude application of the disparate impact theory of discrimination in litigation charging sex-based wage discrimination. This suggests that the similar "reasonable factors other than age" language of section 4(f)(1) of the ADEA might at least restrict the applicability of the disparate impact theory of discrimination in ADEA litigation to something less than its scope in Title VII litigation alleging race discrimination. See also EEOC v. Wyoming, 460 U.S. 226, 232-33 (1983) (section 4(f)(1) was intended "to insure that employers were permitted to use neutral criteria not directly dependent on age").

(footnote continued from preceding page)
to "make a report to the Congress . . . containing the results of such study and . . . include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable."

**/ Rather than duplicate Professor Blumrosen's extensive summary and analysis of the legislative history of the ADEA, from which he concluded that the Act prohibits only intentional discrimination, I am enclosing a copy of his article with this letter.

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Thus, I believe that both the legislative history of the ADEA and section 4(f)(1) of the Act should be considered in analyzing the applicability of the disparate impact theory of discrimination in ADEA litigation. One district court recently did this, and held that the disparate impact theory of discrimination is applicable in ADEA litigation. EEOC v. Governor Mifflin School District, 39 Fair Empl. Prac. Cas. (BNA) 1059 (E.D. Pa. 1985). The district court first noted the difference in language between the Equal Pay Act and section 4(f)(1) of the ADEA -- i.e., the inclusion of the word "reasonable" in the ADEA -- and concluded that while the Equal Pay Act "involves an absolute defense," the ADEA provision is consistent with standard Title VII disparate impact analysis. Id. at 1065. The district court also considered the legislative history of the ADEA, and concluded that while it contained "certain suggestions" to the effect "that Congress intended to limit the application of the ADEA to cases of intentional discrimination," on balance "Congress intended to treat the ADEA and Title VII identically." Id. And finally, the district court suggested that limiting the ADEA to intentional discrimination would defeat the statute's division of violations into "willful" and nonwillful categories for purposes of calculating damages and the statute of limitations. Id. at 1066.

The question of whether, and if so to what extent, the disparate impact theory of discrimination is applicable in ADEA litigation is very difficult, complex and important. This issue has been the subject of considerable discussion in law journals. E.g., Stacy, A Case Against Extending the Adverse Impact Doctrine to ADEA, 10 Employee Rel. L.J. 437 (1984); Note, Disparate Impact Analysis and the Age Discrimination in Employment Act, 68 Minn. L. Rev. 1038 (1984); Player, Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?, 14 Toledo L. Rev. 1261 (1983); Note, Age Discrimination and the Disparate Impact Doctrine, 34 Stan. L. Rev. 837 (1982). It will require careful attention by the Equal Employment Opportunity Commission and by the courts, in order to insure that the purposes of the ADEA -- "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment" -- are pursued, and achieved, effectively.

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I hope that these comments are responsive to your request. I would be happy to answer any further questions you have, or to meet with you at your convenience.

Sincerely yours,

Jeffrey I. Zuckerman

cc: The Honorable Orrin G. Hatch,
Chairman,
Committee on Labor and Human Resources,
United States Senate,
Washington, D.C. 20510.

(Enclosure)

Senator METZENBAUM. Mr. Zuckerman, the Supreme Court in the *Weber* case held that title VII permits consideration of race or sex as part of an effort to open up opportunities for blacks and women in the work force. That is known as "permissible affirmative action".

In a memorandum to this committee on November 25, 1985, you criticized a proposed EEOC settlement that took account of race and sex in setting hiring and promotion goals for an employer.

In your statement you asserted that, quote, "The rule of title VII is that race and sex should not be taken into consideration by an employer. It is therefore inappropriate and counterproductive for the EEOC to enter into agreements with employers that require them to take these factors into consideration in their employment decision."

My question to you is this. How can you take that position in spite of the Supreme Court decision in *Weber*?

Mr. ZUCKERMAN. The Supreme Court decision in *Weber* addressed a voluntary affirmative action program that included a specific quota for whites and blacks in a training program. It was a voluntary program by the employer, and the Supreme Court stressed the limited circumstances in terms of not—I cannot remember the exact language—but along the lines of not inordinately trammelling the rights of the white employees. There were a number of very specific limitations. The Court also stressed the voluntariness of the plan before it, and reserved for another day the question of whether a court could order such a plan.

When we come into dealing with the Government, what the Government may require—and I want to back up and say that the Supreme Court was very conscious of this inherent conflict between what it was permitting and the fundamental principle underlying title VII. And the Supreme Court concluded that under the specific facts and circumstances of the *Weber* situation, a voluntary quota was permissible, and that is the law. And I would enforce the law,

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if confirmed as general counsel, in accordance with the *Weber* decision.

When we move the extra step to the Government coming in and compelling this kind of activity on the part of an employer, that is a question the Supreme Court has not yet resolved, except to the extent that it was resolved in *Stotts*, which involved a court order. I would say that if the Government becomes involved in telling an employer to discriminate on the basis of race, I would say, Senator, that that is exactly the problem that the entire Civil Rights Act of 1964 was primarily focused upon: Government discriminating, and Government telling people to discriminate, on the basis of race. And that is why I have this fundamental problem, Senator, with the EEOC as the enforcement agency for title VII, as the Government, going and telling an employer to discriminate on the basis of race.

Senator METZENBAUM. Well, you talk about the Government telling an employer. And the Supreme Court said that title VII permits consideration of race or sex as part of an effort to open up opportunities for blacks and women in the work force.

You said in your statement to us, "The rule of title VII is that race and sex should not be taken into consideration by an employer." And you have carried it far beyond what the Supreme Court has stated, and as I see your position, it is Zuckerman on the issue, not the law of the land, because I do not know where you get the statement that, "It is therefore inappropriate and counterproductive for the EEOC to enter into agreements with employers that require them to take these factors into consideration in their employment decisions."

Is there some Supreme Court decision that you used for that statement?

Mr. ZUCKERMAN. I think there would be a number, including the general rule of *Weber*. But I think perhaps the best place it is summed up is where the Supreme Court said, and I quote, "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

That is from the case of Griggs versus Duke Power Co., and I would submit that that is the general rule, the fundamental principle, of title VII. Weber says that under certain limited circumstances, an employer may voluntarily take race into consideration. But the basic rule is, as the Supreme Court has said, discriminatory preference for any group, majority or minority, is precisely and only what Congress has proscribed.

Senator METZENBAUM. But you said to us, very simply—there was not any question of voluntary, involuntary—you said, "The rule of title VII is that race and sex should not be taken into consideration by an employer." Now I am asking you what is the authority for that statement, because what you just quoted does not support that position. This is a simple statement of yours, and I know of no Supreme Court decision that holds to that effect.

Mr. ZUCKERMAN. Well, I submit, Senator, that that is the general rule of title VII as interpreted by the courts, as stated by the Congress when it enacted title VII, and as appears on the face of title VII. That is the basic rule of title VII that an employer is not to discriminate.

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Senator METZENBAUM. Has that been the rule for a long time?

Mr. ZUCKERMAN. It seems to me that that was the rule as enacted by Congress in 1964.

Senator METZENBAUM. OK. Now, former President Nixon's Attorney General John Mitchell stated in a 1969 advisory opinion cited with approval by four Justices in the *Bakke* case, quote, "It is not correct to say that title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees."

Don't you believe—the Supreme Court has stated it, and the Nixon Justice Department has stated it—don't you think there is some question as to whether Zuckerman can state it 180 degrees the opposite way?

Mr. ZUCKERMAN. With all due respect to former Attorney General Mitchell, I do not think this would be the only thing on which I would disagree with him.

The CHAIRMAN. In the *Griggs* case and also in the *Stotts* case.

Mr. ZUCKERMAN. The Supreme Court in *Weber* addressed certain limited circumstances in which it permitted, under those particular facts and circumstances, it permitted the employer to set aside a number of training positions on the basis of race. Under those limited circumstances—that is an exception to the general rule. And I submit that the general rule throughout the history of title VII has been and should be that an employer is not to discriminate on the basis of race or any of the other factors named in the statute.

Senator METZENBAUM. The EEOCs' own guidelines on affirmative action support the use of reasonable affirmative action which may include goals and timetables in order to further the clear congressional intent to encourage voluntary affirmative action.

As general counsel, will you enforce these guidelines which are the law governing the Commission's operations?

Mr. ZUCKERMAN. Yes, sir. I think those guidelines are in line with this idea of the Weber decision, and in fact as a matter of law, any employer who relies on those guidelines is by statute protected from any liability to anyone for having relied on those guidelines.

Senator METZENBAUM. Mr. Chairman, I have a substantial number of additional questions, but I will yield to Senator Kennedy in order that we can go back and forth until we conclude.

Senator KENNEDY. Thank you, Senator Metzenbaum.

I have one significant area. I would like to direct your attention to the definitions of discrimination. Now, title VII forbids the discrimination against minorities which is intentional. That is where an employer is motivated by prejudice against a particular group. Is that your understanding?

Mr. ZUCKERMAN. That is one thing that title VII prohibits.

Senator KENNEDY. OK.

Mr. ZUCKERMAN. It goes beyond that.

Senator KENNEDY. But it includes that; title VII says that along with other——

Mr. ZUCKERMAN. Yes, sir.

Senator KENNEDY. Now, the Supreme Court unanimously held in the *Griggs* case that title VII proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation; is that correct?

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Mr. ZUCKERMAN. Yes, sir.

Senator KENNEDY. And the Court specifically noted it was not necessary to show not that the due power intended to exclude more blacks; it was enough that the test had that particular effect; is that correct?

Mr. ZUCKERMAN. Yes.

Senator KENNEDY. And the way to show that an employment practice has a disparate impact on minorities is with statistics that show the percentages of white and minority applicants or employees affected by the practice. Is that correct?

Mr. ZUCKERMAN. We use statistics to measure the disparate impact.

Senator KENNEDY. Now, after the passage of the EEO Act, the 1972 amendments, the Equal Employment Opportunity Commission enacted the uniform guidelines on employee selection procedures, and the uniform guidelines on employee selection procedures provide that it is a violation of the Act for the selection procedures to have a disparate impact on minorities unless the test is shown to be job related.

Now, you have been Chief of Staff of the EEOC since November 1974; is that right?

Mr. ZUCKERMAN. I have been Chief of Staff in the Chairman's Office since August 1984.

Senator KENNEDY. In that capacity, you assisted Chairman Thomas in writing submissions to the Office of Management and Budget concerning significant regulatory actions of the Commission.

I want to talk with you about some of the statements made in that document. It states, and I quote, that, "The EEOC has turned the statutes on their heads by using rigid statistical rules to define discrimination without regard to the plain meaning of that term."

That is in this particular document, "Equal Employment Opportunity Commission: The Overview." Are you familiar with this document?

Mr. ZUCKERMAN. I am familiar with it. I do not have a copy of it, but I am generally familiar with it.

Senator KENNEDY. I would ask staff to give him a copy in case he wants to refer to it.

In that document, in a prominent place on page 1, it says, "EEOC has turned the statutes on their heads by using rigid statistical rules to define discrimination without regard to the plain meaning of that term."

Now, we have already agreed that the statistics are the only way to prove a disparate impact case. Are you opposed to the use of the statistics to prove a disparate impact case?

Mr. ZUCKERMAN. No. The only way to prove a disparate impact case is with statistics.

Senator KENNEDY. So statistics are necessary and sufficient to make a showing of disparate impact; is that correct?

Mr. ZUCKERMAN. Absolutely.

Senator KENNEDY. OK. Then what are the rigid statistical rules that the EEOC is now using that have turned the antidiscrimination laws on their heads and defined discrimination without regard

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to the plain meaning of the term? Is that the 80-percent rule? Is that what you are referring to?

Mr. ZUCKERMAN. Well, I think there is more. Let us start with, for example, let us use the *Sears* case——

Senator KENNEDY. Just tell me what they are, then. You have had the Supreme Court holding. You have indicated that statistics are necessary in the disparate impact cases. You have indicated that the rules or the regulations that have been in effect for a number of years, 5 or 6 years, in any event, that provide for those statistics are turning the law on its head.

My question is what is it that is turning it on its head?

Mr. ZUCKERMAN. To start off, statistics are used both in disparate treatment and in disparate impact cases. Now, one example we have is the use of statistics where simply any statistical underrepresentation of a group is taken as defining discrimination and disparate treatment.

The most recent, well-known example is the *Sears* litigation. There, we had a situation where the district court said we did not even do the statistics correctly. But that is one example where on the basis of statistics alone, simply by plugging in some numbers, the Commission concluded and then prosecuted this case for years, at substantial expense, arguing that that was discrimination.

Senator KENNEDY. Well, let me sharpen this, if I could. What are the statistical information that you are recommending, then? What rule are you recommending?

We have had in effect the regs for a number of years, which most people believe has had a greater impact in breaking down discrimination in terms of minorities and women in our society than certainly the intent provisions, which all of us would agree are extremely difficult to prove.

Now, specifically, what are the statistical recommendations that you are making?

Mr. ZUCKERMAN. OK. My first example is in the area of disparate treatment.

Senator KENNEDY. That is all I am interested in doing.

Mr. ZUCKERMAN. My first example was in the disparate treatment area. We have got to move beyond——

Senator KENNEDY. That is not my question.

Mr. ZUCKERMAN [continuing]. This equation——

Senator KENNEDY. As a good lawyer, can we get an answer to the question—what are the statistical recommendations that you are making to enable to make the case in the disparate impact case?

Mr. ZUCKERMAN. On the disparate impact case, the Commission——

Senator KENNEDY. That is all I am talking about.

Mr. ZUCKERMAN. OK. The statistics are used in both.

Senator KENNEDY. That is all I am talking about, that is all I am talking about, what my premise was, what I have been referring to, and that is what I want your answer on, on the disparate impact cases.

Mr. ZUCKERMAN. On the disparate impact cases.

Senator KENNEDY. What statistical recommendations are you making?

Mr. ZUCKERMAN. I am not making and have not made any. What we have been trying to do is study comprehensively the Uniform Guidelines on Employee Selection Procedures to see whether there is anything that ought to be changed in order to more effectively enforce title VII.

One of the things being studied is whether the 80-percent rule should be changed. The 80 percent rule was adopted as I understand it, because it was felt that oftentimes there would be small samples, and they did not have any adequate way in 1978 to measure the statistical significance of disparate impact with small samples. They used an 80-percent rule as a substitute for measuring the statistial significance of disparate impact. Well, the profession of statistics has gone ahead, I am told, and there are now more valid ways to measure the significance of a disparate impact.

Senator KENNEDY. And what are they?

Mr. ZUCKERMAN. I am not a professional statistician. This is part of what——

Senator KENNEDY. All right. That is the answer to the question.

So I gather that you are prepared to effectively vitiate the existing—well, if you have looked through the recommendations here and you give disparagement to the existing statistical process and procedures which have been used in past cases and have been recognized by the Supreme Court, and you are basically indicating opposition to that, as you have stated here, and yet I understand you have nothing to offer in substitute for that. Have you ever thought about a 75-percent rule?

Mr. ZUCKERMAN. We are trying to see whether there is something better than the 80-percent rule. If there is nothing better, if there is no better way to enforce the statute than the 80-percent rule, then my recommendation would be—and again, this is a Commission decision—my recommendation would be, if there is no better way to enforce the statute, no better way to determine disparate impact than the 80-percent rule, then leave the 80-percent rule as it is—if there is no better way. That is what is being studied. The staff was asked to pull together the best thinking from anyone and everyone on that subject.

Senator METZENBAUM. If Senator Kennedy would yield for 1 second?

Senator KENNEDY. Yes.

Senator METZENBAUM. Senator Hatch, as I indicated to you—and I do not mean to be interrupting Senator Kennedy at all—but Senator Kennedy has questions, Senator Simon has questions, Senator Kerry is coming back with questions. I am going to excuse myself, but I want it to be understood that I have a substantial number of additional questions, and of course, I am prepared to return whenever you schedule the next hearing.

The CHAIRMAN. As I understand it, you cannot return this afternoon.

Senator METZENBAUM. I cannot return this afternoon.

Senator KENNEDY. I think we are recessing at noontime, in any event.

The CHAIRMAN. Yes. I have to recess just a few minutes before noon. We will finish as much as we can.

Senator METZENBAUM. Whatever you schedule will be fine with me.

The CHAIRMAN. Why don't you continue, Senator Kennedy?

Senator KENNEDY. I must say, the way that I read your position, with all due respect, is that we have a Supreme Court which has defined very clearly about the validity of the use of the statistics, improving the disparate impact effect; we have regulations which have been used for a number of years which have resulted in the striking down of discrimination, and we have the recommendations that have been made by the chairman, with evidently your blessing—either that, or you can indicate before the committee that you disapproved that; you have not indicated that—that would undermine, certainly, that particular formula, and we have your statement here that you are not prepared to offer us, or make a recommendation about what statistical formula might be used in order to continue that extremely effective effort to demonstrate disparate impact, and we are leaving that up to statisticians who are going to come up at some time, in some study, somewhere along the line, who at least, I gather from what you said, are going to be more efficient, more effective, although you do not know what they are, and you are not able to tell us what they are, in being able to carry on the very clear thrust and purpose of the Congress when it passed that particular legislation.

I just find that, with all respect to others, that if you have that kind of undermining of one of the most effective tools, mechanisms, for the elimination of discrimination, I find it difficult to see how we can take much satisfaction about your strong commitment to that particular vehicle, the use of the disparate impact cases in terms of eliminating discrimination.

You indicated that an 80-percent rule turns the statute on its head; those are the words that are used. "The rule puts the statute on its head." Are you claiming that?

Mr. ZUCKERMAN. The rule——

Senator KENNEDY. That is a pretty broad indictment, a pretty broad indictment of something that has had a very profound effect, and I want to give you a chance to explain why you believe that that formula puts the statute on its head.

Mr. ZUCKERMAN. I will explain my view. First, I would like to point out, because, I think, this is critical to my commitment to enforcement, one of the first things I wrote at the Commission. It was a recommendation to the chairman, in response to an inquiry from the staff after the Commission had voted to review the Uniform Guidelines that the staff be directed to enforce the Uniform Guidelines unless and until the Commission chose to revise the guidelines in any way. The committee staff has a copy of this.

As far as enforcement goes, the Uniform Guidelines were to be enforced.

Second, the guidelines with respect to adverse impact go far beyond what the Supreme Court has ruled. The Supreme Court has ruled that adverse impact is a test of discrimination in some circumstances. It is a theory of discrimination appropriate to be applied, for example, in connection with scored tests, with height or weight requirements, or with other specific, objective requirements

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for a job, that may disqualify some people more than others on the basis of race, sex, or national origin.

The lower courts have disagreed when you get beyond there——

Senator KENNEDY. We are not talking about job-related. I know what the regs say on that, so we do not have to get into that. We are talking about non-job-related.

Mr. ZUCKERMAN. But the regs go beyond those kinds of what are referred to as objective criteria. And the regs would have——

Senator KENNEDY. So the 80-percent rule in and of itself is not troublesome?

Mr. ZUCKERMAN. When you get beyond the objective criteria, what the guidelines say, which the Supreme Court has never said and which some courts of appeals have disagreed with, is that any time an employer's hiring rate for one group is less than 80 percent of its hiring rate for another group, wherever that happens, that is a prima facie violation of title VII. That goes beyond anything the Supreme Court has said, and it is contrary to what some courts of appeals have said. And then that raises a question: Is that a proper definition of a prima facie case of discrimination, that total, general proposition?

When we are talking only of the objective criteria, then the question is whether the 80-percent rule is the best possible measure for adverse impact, or whether there is some better possible measure.

Senator KENNEDY. We are running out of time, and we are not going to be able to get into those cases, but there are certainly cases which would indicate contrary to your stated understanding of those, of course. And the only point I would make is that part of the whole consideration for the nominee is whether we are going to have someone who is going to attempt to nitpick at these regulations or whether we are going to have someone who is going to be trying to find ways and means which have both been respected by the courts to elaborate on the effort to eliminate discrimination. And that is what I am gathering is your understanding of a much more limited concept for that particular function, and that, I find troublesome. But time is running out on this, and I welcome the agreement, as I understand, of the Chair to have another day of hearings.

The CHAIRMAN. Well, if you will yield on that point, as I understand this point, you are not abandoning the 80-percent rule, whether it is good or bad, you are not abandoning it. But you are saying that if you use the rule, you still have to have 80 percent-plus, you have got to have some other factors before you can really prove discrimination.

Mr. ZUCKERMAN. Under the existing guidelines, if the 80-percent rule is violated, period, that is a prima facie case of discrimination. As a general, across-the-board rule, that goes beyond what the Supreme Court has said, and—if I misspoke before in response to Senator Kennedy, let me correct myself—the courts of appeals are divided on that point. Some courts have agreed with it as a general point, some have disagreed with it.

The CHAIRMAN. But there is a real question whether 80 percent standing alone can prove discrimination. You will have to have some additional factor in your opinion.

Mr. ZUCKERMAN. Right, on an across-the-board basis.

The CHAIRMAN. I agree with that.

Senator KERRY. Mr. Chairman, could I just ask, are you intending to have a separate day of hearings?

The CHAIRMAN. Yes. Senator Metzenbaum has said, Senator Kerry, that he has a number of other questions, and he does not have any time today. Frankly, this may be a good time to break, because I have to leave. I have committed to a live television program—and I know that Senator Kennedy is fully familiar with that situation, so I know he will be very accommodating on this.

In any event, I think what we will do—this would appear to be a good place to break. Senator Metzenbaum cannot be here this afternoon.

Senator Pell, did you have any questions?

Senator PELL. No, Mr. Chairman. I just wanted to get a flavor of the hearing and Mr. Zuckerman.

The CHAIRMAN. OK. Well, let me do this, Mr. Zuckerman. I am going to have to schedule another day so that Senator Metzenbaum can—Senator Kennedy, are you going to have some more questions at the next hearing?

Senator KENNEDY. Yes.

The CHAIRMAN. Senator Kennedy will have some more as well. Senator Kerry has some more, and I presume there may be some others.

[Additional material supplied for the record follows:]

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1217 North Belgrade Road
Silver Spring, Maryland 20902

January 21, 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Chairman Hatch:

I enclose my responses to the written questions Senator Kennedy submitted in connection with the Committee's consideration of my nomination to serve as General Counsel of the Equal Employment Opportunity Commission.

In order to facilitate the Committee's review of my responses, I have provided the full text of the questions, with all their footnotes. I note that item C3 in the questions cross-references two earlier questions but does not ask a question, and therefore I have not responded to it.

I would be happy to answer any further questions Senator Kennedy may have, or to meet with him at his convenience.

Sincerely yours,

Jeffrey I. Zuckerman

(Enclosure)

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Questions for Jeffrey Zuckerman,
submitted by Senator Kennedy

THE DEFINITION OF ILLEGAL EMPLOYMENT DISCRIMINATION AND THE EMPLOYEE SELECTION GUIDELINES

A. Definition of Discrimination

The Uniform Guidelines on Employee Selection Procedures1/ define "discrimination" in violation of Title VII.

> Section 3. Discrimination defined: Relationship between use of selection procedure and discrimination. - A procedure having adverse impact constitutes discrimination unless justified. The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex or ethnic group will be considered to be discrimination and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

Section 6 provides in principal part that the employee [sic] can eliminate any adverse impact instead of validating the selection procedure.

1/ The EEOC and four other governmental agencies issued the Uniform Guidelines. See Statement of Patrick O. Patterson on Equal Employment Opportunity Policy and Law on Behalf of The NAACP Legal Defense and Educational Fund, Inc., Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor (October 2, 1985), ("LDF October Statement"), at pp. 4-13.

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1. Do you think that the Guidelines' definition of "discrimination" is a correct reading of Title VII as intended by the Congress and interpreted by the Supreme Court?2/

Answer

The core of the definition of discrimination in the Uniform Guidelines is derived from, and is consistent with, the ruling of the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." However, some aspects of the definition of discrimination in the Uniform Guidelines go beyond what the Supreme Court has ruled. Indeed, in one respect, the definition of discrimination in the Uniform Guidelines seems to run contrary to a ruling of the Supreme Court. Section 3B of the Uniform Guidelines requires that an employer include as part of any validity study "an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible . . . ." In Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), however, the Supreme Court held that once an employer shows that its tests are "job related," the burden is upon the complaining party "to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"

2/ See LDF October Statement, at pp. 7-10. Note that there are explicit quotations from the Report of the Senate Committee on Labor and Public Welfare listed in the Statement.

See also, Statement of Barry Goldstein, Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc., Regarding Equal Employment Opportunity Policy Before The House Committee on Education and Labor, December 14, 1984 ("LDF December Statement"), at 14-19; this section sets out in detail the development of the standard in Griggs v. Duke Power Co., 401 U.S. 424 (1971) which provides the basis for the definition of discrimination in the Uniform Guidelines.

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2. Would you as General Counsel of the EEOC support and recommend the litigation of cases which are based on statistical evidence which demonstrates that a selection practice has an adverse impact on a minority group or on women and that there is no showing that the selection procedure is related to job performance, even though there is no evidence to justify the conclusion that the employer intended to discriminate?

Answer

If confirmed as General Counsel of the EEOC, in deciding whether to recommend that the Commission commence litigation in any particular situation, I shall seek to apply the law in the context of all the relevant facts and circumstances. The courts have held that a violation of Title VII may sometimes be established where statistical evidence demonstrates that a selection practice has an adverse impact upon people of a particular race, sex or national origin and there is no showing that the selection procedure is job related, even though there is no evidence to justify the conclusion that the employer intended to discriminate. I would support and recommend the institution of litigation whenever a violation of Title VII has occurred.

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The Overview submitted by Chairman Clarence Thomas of the Equal Employment Opportunity Commission to the Office of Management and Budget and printed in the Regulatory Program of the United States Government (Aug. 8, 1985) ("EEOC Overview"), at 523-24,3/ contains the following statement:

> The premise underlying UGESP [Uniform Guidelines] is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of different races, sexes, or national origins who are hired or promoted by that employer.4/ (Footnote added)

3. (a) Do you agree that this is a "premise underlying" the Guidelines? (b) Or do you agree that the "premise underlying the Guidelines was accurately stated by the Report of the Senate Labor and Public Welfare Committee for the Equal Employment Opportunity Act of 1972,5/ that "Civil Service selection and promotion techniques6/ and requirements are replete with artificial requirements that place a premium on 'paper credentials'" [which] in the private sectors . . . have often proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (see e.g. Griggs v. Duke Power Co. . . . .)"?7/

3/ See Appendix A, LDF October Statement.

4/ Note that Jeffrey I. Zuckerman is listed as the agency contact person for the proposed changes in the Uniform Guidelines. EEOC Overview, at 527.

5/ Pub. L. No. 92-261, 86 Stat. 103. This Act amended Title VII of the Civil Rights Act of 1964.

6/ The 1972 Act amended Title VII to permit employees to sue local and state governments and the federal government for employment discrimination. Under the 1964 Act these governments could not be sued. One of the primary reasons for enactment of the 1972 Act was to permit challenges to arbitrary governmental selection practices which have adverse impact.

7/ S. Rep. No. 92-415, 92d Cong., 1st Sess. 14-15 (1971). See LDF October Statement, at 9-10.

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Answer

(a) Yes.

(b) The Senate Committee on Labor and Public Welfare in 1971 was concerned that federal Civil Service selection and promotion techniques and practices might be "of questionable value in predicting job performance" and might be "perpetuating existing patterns of discrimination." S. Rep. No. 415, 92d Cong., 1st Sess. 14 (1971). This concern is consistent with the premise identified by Chairman Thomas in his EEOC Overview.

The 1971 Committee Report did not deal with the Uniform Guidelines, which were issued in 1978. Nor did the the Committee Report cite or discuss the EEOC's "Guidelines on Employee Selection Procedures," 35 Fed. Reg. 12333 (1970), which were in effect in 1971.

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The EEOC Overview also states

> UGESP [Uniform Guidelines] also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral.

EEOC Overview, at 524.

4. (a) Do you agree that the Uniform Guidelines "seem[ ] to assume some inherent inferiority of blacks . . . ." (b) Or do you agree as the Senate Committee stated that a premise underlying the Guidelines is "[t]he inevitable consequence of [artificial requirements that place a premium on paper credentials] is that classes of persons who are socio-economically or educationally disadvantaged suffer a heavy burden in tying [sic] to [such] requirements?"8/

Answer

(a) Yes.

(b) I also agree with the observation of the Senate Committee on Labor and Public Welfare that "persons who are socio-economically or educationally disadvantaged suffer a very heavy burden in trying to meet . . . artificial qualifications [that place a premium on 'paper' credentials]." S. Rep. No. 415, 92d Cong., 1st Sess. 14 (1971). Chairman Thomas' statement in the EEOC Overview is correct precisely because the Uniform Guidelines attach the disadvantage to a person's race, sex or national origin, rather than, and without regard, to that person's socio-economic and educational background. In other words, while the Committee suggested that an individual's socioeconomic and educational background may affect that individual's ability to satisfy requirements based upon "paper credentials," the Uniform Guidelines suggest by implication that this ability is based upon the individual's race, sex and national origin, and that any particular black, Hispanic, member of any other minority group or woman is inherently unable to satisfy such requirements, without regard to that individual's socioeconomic and educational background.

8/ S. Rep. No. 92-215, 92d Cong. 1st Sess. 14-15 (1971). See LDF October Statement, at 10.

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5. If you disagree with the views of Chairman Thomas as stated in the EEOC Overview what actions will you take as General Counsel, an independently confirmed position, to insure that these erroneous views of Chairman Thomas do not influence EEOC litigation for which you are responsible?

Answer

As noted above, I agree with the views of Chairman Thomas cited in questions A3 and A4. More generally, however, if confirmed as General Counsel, I shall advise the Commission and otherwise act on the basis of the statutes the Commission enforces, including the Congressional intent underlying them and the case law interpreting them, regardless of whether my judgment in any particular situation coincides with, or differs from, that of Chairman Thomas or any other member of the Commission.

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The EEOC Overview, at 527, lists the following as a "potential policy issue[ ] to be resolved":

> Under what circumstances, if any, is it a violation of Title VII if the percentage of applicants of any particular race, sex, or nationalization [sic] hired by an employer is different from the percentage hired of any other race, sex, or national origin?

6. Hasn't this so-called policy issue been resolved by the Supreme Court in Griggs v. Duke Power Co. and by Congress?9/

Answer

This question has not been resolved in all respects. For example, the courts have disagreed over whether, and if so how, to apply the disparate impact theory of Griggs where an employer uses subjective criteria in its hiring.

9/ "Congress has now provided that tests or criterion [sic] for employment or promotion may not provide equality of opportunity only in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

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7. What actions will you take as General Counsel to insure that the EEOC doesn't use its resources to examine so-called policy issues fully resolved by Congress and the Supreme Court rather than using its resources to prevent discrimination against minorities and "ensur[ing] that the standards in the Griggs case are fully met?"10/

Answer

If confirmed as General Counsel of the EEOC, I shall do all I can to support the Commission in its commitment to devote all available resources to enforcement of Title VII, the Equal Pay Act, the Age Discrimination in Employment Act and the Rehabilitation Act.

10/ The Senate Committee stated that "[f]or example, the Committee expects the Civil Service Commission to undertake a thorough re-examination of its entire testing and qualification program to ensure that the standards enunciated in the Griggs case are fully met." (Emphasis added) S. Rep. No. 92-415, 92d Cong., 1st Sess. 14-15 (1971).

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B. Employers Have an Obligation to Demonstrate that Selection Procedures Which Have a Discriminatory Effect Are Job Related.11/

1. Do you agree that the fair employment law requires employers to demonstrate the job relatedness (that is that the use of the procedure will result in the selection of more productive workers) of a selection procedure which has a discriminatory effect?

Answer

Where disparate impact analysis is applicable, Title VII requires that an employer demonstrate that a particular employee selection procedure is job related.

11/ In a follow-up case to Griggs v. Duke Power Co., the Supreme Court made this requirement clear.

> In Griggs . . . the Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets the "burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); see LDF December Statement, at 14-15.

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2. Do you agree that the law requires that, as the Uniform Guidelines state, that employers must show the job relatedness of tests with discriminatory results not on the basis of guess or supposition but on the basis of "professionally acceptable methods?"12/

Answer

Employment tests having disparate impact must be shown to be job related by professionally acceptable methods.

12/ The Supreme Court stated in Albemarle Paper Company that

> The message of these Guidelines is the same as that of the Griggs case -- that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."

Albemarle Paper Company v. Moody, 422 U.S., at 431 (quoting 1970 EEOC Guidelines); see LDF October Statement, at 10.

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3. Doesn't the continuing legacy of racial discrimination and cultural and educational deprivation in our society which obviously contribute to the failure of blacks and other minorities to perform as well on standardized tests and other selection procedures that emphasize verbal skills and mastery of the dominant culture require the continued close investigation to determine whether any selection procedure which has an adverse racial or ethnic impact is in fact job related and validated13/ by acceptable professional standards?

Answer

The continuing legacy of racial discrimination requires vigorous enforcement of Title VII by the Commission. If confirmed as General Counsel of the EEOC, I shall enforce Title VII in all respects, including to the extent it requires an employer to show, by professionally acceptable methods, that an employment test is job related.

13/ "The concept of validation as used in personnel psychology involves the establishment of the relationship between a test instrument or other selection procedure and performance on the job." Uniform Guidelines, at Supplementary Information, section V.

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* * * * *

A recent comprehensive economic analysis based on data covering 1974 through 1980 by Professor Leonard14/ concludes that "both Title VII and affirmative action have strong and significant effects on the employment of black males," that there is no "evidence of reverse discrimination," that there has been no decline in productivity, and that the "major contribution of the EEOC . . . has probably been in helping to establish far-reaching principles of Title VII . . . ." Leonard, Title VII, at 149, 153, and 171-72.15/

4. As General Counsel will you strongly support, defend, and implement by the far-reaching principles of Title VII law which have been advocated by the EEOC for almost twenty years under Republican and Democratic Demonstrations [sic], such as the effect standard established in Griggs as set forth in the Uniform Guidelines?

Answer

If confirmed as General Counsel of the EEOC, I shall enforce Title VII as vigorously and effectively as possible, consistent with the language of the statute, the Congressional intent underlying it and the case law interpreting it.

14/ Leonard, "Antidiscrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII and Affirmative Action on Productivity" (Institute of Industrial Relations, Berkeley, CA, 1984), (Leonard, Title VII"). The scope of this massive empirical study is described in LDF October Statement, at 26 n.31. Professor Richard B. Freeman, an economist at Harvard University and at the National Bureau of Economic Research, has described Leonard's work as "perhaps our best scientific evidence on the extent to which affirmative action has raised employment of protected groups." Freeman, "Affirmative Action: Good, Bad or Irrelevant?," New Perspectives (U.S. Commission On Civil Rights, Fall 1984), at 23, 25. See LDF December Statement, at 21-22, n.8.

15/ Leonard further concludes that "[t]he evidence [covering 1974 through 1980] presented here is consistent with effective federal antidiscrimination policies that have led to increased employment opportunities for blacks without a significant decline in their relative productivity. This suggests that job redistribution has not entailed a large efficiency cost and that government policy has made progress in fighting racial discrimination." Leonard, Title VII, at 172.

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* * * * *

The EEOC Overview lists the following as a "potential policy issue [ ] to be resolved:"

> Under what circumstances, if any, and according to what standards, does Title VII require that an employer demonstrate the validity of its employee selection procedures?

5. Hasn't this so-called policy issue been resolved by the Supreme Court's repeated statements that when a selection procedure has a discriminatory effect the employer must show "by professionally acceptable methods," that is by validation, that the procedure may make a verifiable contribution to productivity?

Answer

This policy issue has not been entirely resolved by the Supreme Court. For example, the Court has not entirely resolved the question of what types of selection procedures are subject to disparate impact analysis -- a question as to which lower courts have disagreed -- or defined what constitute professionally acceptable methods for showing that an employment test is job related.

6. Why is the EEOC throwing into question important and settled fair employment principles? What will you do as general counsel to defend these settled principles and prevent this possibly harmful and certainly wasteful re-examining of settled principles?

Answer

If confirmed as General Counsel of the EEOC, I shall advise the Commission against undertaking any harmful or wasteful reexaminations of settled principles.

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C. The Importance of Record-Keeping.

In enacting §709(c) of Title VII16/ Congress realized the importance of proper record-keeping in order to permit employers to self-evaluate their practices, for federal agencies to monitor compliance with the law, and for federal agencies and private [sic] to use in enforcement litigation.

1. In order to implement the Title VII "effects test." isn't it critical for employers and federal agencies to know the "consequences"17/ of selection procedures by race, ethnic background, and gender of the applicants?

Answer

In order to determine the rates at which applicants of different races, ethnic backgrounds and genders are selected, it is, of course, necessary to know the races, ethnic backgrounds and genders of all applicants and of those who are selected.

16/ "Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall aprescribe [sic] by regulation or oder [sic], after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require such employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program."

17/ As the Supreme Court stated in Griggs, "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." (Emphasis in original), 401 U.S., at 432.

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* * * * *

The EEOC Overview, at 527, lists the following as a "potential policy issue[ ] to be resolved:"

> What records, if any, should employers be required to keep and for how long, concerning the race, sex, and national origin of their employees, former employees, and applicants for employment?

2. What actions, if any, will you take as general counsel to insure that employers will continue to be required to keep records18/ by race, gender, and national origin in order that employers and federal agencies may determine the racial, gender, and ethnic consequences and possible adverse impact of selection practices?

Answer

If confirmed as General Counsel, I shall enforce the Commission's recordkeeping requirements through litigation where necessary and appropriate.

3. See section A. questions 6 and 7.

18/ For example, the Uniform Guidelines require employers to keep records by race, gender and national origin in order to determine whether a selection procedure has an adverse impact. Section 15(2).

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D. Role of Mr. Zuckerman in the Preparation of the EEOC Overview.

In response to a Freedom of Information Act request, the EEOC stated that four letters enclosing four submissions which entailed 111 pages were sent by EEOC to OMB as supporting materials for the EEOC Overview in the Regulatory Program of the United States Government (1985). LDF October Statement, at Appendix E. The EEOC refused to produce the documents pursuant to the FOIA request. Id.

1. Did you write or participate in the writing of any of these EEOC submissions to OMB?

Answer

I participated in the writing of Chairman Thomas' 1985 submissions to the Office of Management and Budget pursuant to Executive Order 12498.

2. Were these submissions produced by you for this Committee?

Answer

These materials have never been requested by the Committee, and I have never before submitted them. I am, however, submitting these materials to the Committee herewith, under separate cover.

JIZ

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Sen. Simon

QUESTIONS FOR JEFFREY ZUCKERMAN

In reviewing your resume, I noticed that you have little or no litigation experience in the employment discrimination area (Title VII of the Civil Rights Act of 1964) and that your litigation work in other areas occurred more than ten years ago. I also did not see from your resume any evidence of supervisory experience. As General Counsel of Equal Employment Opportunity Commission (EEOC), you would be required to supervise a staff of more than 400 attorneys engaged in litigation in an area in which you appear to be unfamiliar. What makes you qualified for this position?

You joined the Equal Employment Opportunity Commission in August of 1984. It appears from reviewing the litigation records of the commission since that time, there has been a marked decline in the number of cases, excluding procedural enforcement actions, brought by the Equal Employment Opportunity Commission. What brought about this decline? I would especially appreciate having you comment on the apparent change in the agency's enforcement posture in the area of affirmative relief where discrimination is found and affirmative action plans to rectify past discrimination found by the courts.

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1217 North Belgrade Road
Silver Spring, Maryland 20902

February 26, 1986

The Honorable Orrin G. Hatch,
Chairman,
Committee on Labor and Human Resources,
United States Senate,
Washington, D.C. 20510.

Dear Chairman Hatch:

I am pleased to enclose my responses to the written questions Senator Simon submitted in connection with the Committee's consideration of my nomination to serve as General Counsel of the Equal Employment Opportunity Commission.

I would be happy to answer any further questions Senator Simon may have, or to meet with him at his convenience.

Sincerely yours,

Jeffrey I. Zuckerman

(Enclosure)

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Questions for Jeffrey Zuckerman,
submitted by Senator Simon

Question: In reviewing your resume, I noticed that you have little or no litigation experience in the employment discrimination area (Title VII of the Civil Rights Act of 1964) and that your litigation work in other areas occurred more than ten years ago. I also did not see from your resume any evidence of supervisory experience. As General Counsel of Equal Employment Opportunity Commission (EEOC), you would be required to supervise a staff of more than 400 attorneys engaged in litigation in an area in which you appear to be unfamiliar. What makes you qualified for this position?

Answer: I believe that I am qualified to serve as General Counsel of the Equal Employment Opportunity Commission because of my experience from 1974 to 1984 in conducting and supervising litigation, including my work at the law firm of Sullivan & Cromwell, as court-assigned counsel for indigent individuals, in organizing and supervising the operation of a legal services organization, and at the U.S. Department of Justice; my work since 1984 as Chief of Staff in the Office of the Chairman of the EEOC, where I have been deeply involved in the Commission's enforcement of Title VII of the Civil Rights of 1964, the Equal Pay Act, the Age Discrimination in Employment Act and the Rehabilitation Act; and most importantly, my determination to enforce these laws aggressively. I would like to elaborate upon key aspects of this experience.

After graduating Yale Law School in 1972, I spent a year as law clerk to Judge Robert P. Anderson of the U.S. Court of Appeals for the Second Circuit. I had the opportunity to see lawyers with a wide range of styles and skills argue cases before the Second Circuit. I learned a great deal about what makes an appellate argument effective by watching those lawyers, and by listening to assessments of their oral arguments and briefs by Judge Anderson and his colleagues on the Court.

From March 1974 to June 1981 I was associated with the law firm of Sullivan & Cromwell, and was actively engaged in all aspects and phases of litigation. I gained substantial trial experience, briefed and argued appeals, conducted all types of pre-trial discovery, briefed and argued motions for preliminary and summary relief, and negotiated settlements. I also supervised the work of other lawyers and paralegals.

During my years at Sullivan & Cromwell, in addition to my work on behalf of clients of the firm, I represented a number of indigent individuals before the Second Circuit and other federal courts in New York. I also helped organize, and served on the steering committee of, an organization that provided

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free legal services to individuals who could not afford to pay for such representation.

In 1974, almost immediately upon beginning to work at Sullivan & Cromwell, I volunteered to the Second Circuit to accept assignments to represent indigent parties, and I received a number of such appointments over the next seven years. In most of these cases, I represented individuals whose civil rights had been violated, including:

1. Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974), in which I represented a prisoner who had been denied medical treatment. The court of appeals reversed the district court, and found that my client's complaint stated a claim under 42 U.S.C. §1983 for violation of his Fifth, Eighth and Fourteenth Amendment rights to due process of law, and not to be subjected to cruel and unusual punishment.

2. Harned v. Henderson, 588 F.2d 12 (2d Cir. 1978), in which I represented an individual who had pled guilty to a crime without understanding what he was admitting. The district court held, and the court of appeals affirmed, that my client's plea was involuntary, and that his judgment of conviction was therefore entered without due process of law. The judgment of conviction was vacated as null and void.

3. Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), reh'g denied, 590 F.2d 408 (2d Cir. 1979), cert. denied, 442 U.S. 945 (1979), in which I represented an individual who had been convicted of murder on the basis of statements he had made to a police officer and to a police informer who had been assigned to my client's jail cell. The court of appeals affirmed the district court's ruling that there was no infringement of my client's Sixth Amendment right to the assistance of counsel, and the Supreme Court declined review. The Supreme Court subsequently held, in a different case, that statements deliberately elicited by a cellmate who was a government informer could not be used against an accused. United States v. Henry, 447 U.S. 264 (1980). I could no longer represent Mr. Wilson after I joined the Department of Justice, but I arranged for other lawyers to take my place in seeking relief for him based upon the Henry decision. They were unsuccessful in the state courts, the district court and the court of appeals, but the case is now pending before the Supreme Court. Wilson v. Henderson, 742 F.2d 741 (2d Cir. 1984), cert. granted, 105 S.Ct. 3499 (1985).

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4. McCoy v. Willowbrook State School, 75 Civ. 1836 (E.D.N.Y.), in which I represented an individual who had been fired by a state institution without receiving a fair hearing. The district court ruled that my client's discharge had violated his Fourteenth Amendment right to due process of law, but the court of appeals remanded the case for further findings. The case was still pending in in the district court, and new counsel was appointed to represent Mr. McCoy, when I joined the Department of Justice in 1981.

The legal services organization that I helped organize and run served people living on the West Side of Manhattan in New York City, which is where I grew up, and where I lived while I worked at Sullivan & Cromwell. This neighborhood changed enormously during the 1970's. While these changes were a boon for many residents of the area, others suffered. For example, some landlords withheld services from, or harassed, elderly tenants and others who were protected by New York's rent control laws, hoping that these tenants would vacate their apartments, which could then be relet at substantially higher rents. Other landlords converted their buildings to "co-ops," making it necessary for elderly tenants to take certain affirmative steps if they wished to exercise their statutory right to continue renting their apartments. In addition, the poor people who remained in the neighborhood, many of whom were elderly, needed advice concerning their rights with respect to government programs such as Social Security, Medicare, Medicaid and SSI.

A few of us who lived on the West Side and worked at large law firms believed that we had an obligation as members of the Bar and residents of the community to make sure that adequate legal services were available to those of our neighbors who could not afford to pay for such services. Accordingly, in 1979 we began to operate a walk-in legal clinic, every Sunday afternoon and Thursday evening. Hundreds of people who could not have afforded to pay for legal representation took advantage of our services.

In June 1981 I left Sullivan & Cromwell to become a Special Assistant to the Assistant Attorney General in charge of the Antitrust Division at the U.S. Department of Justice. My principal assignment was to organize and supervise a review of the more than 1,300 judgments that had been entered in Government antitrust actions and remained in effect. Our goal was to identify those judgments that were having anticompetitive effects or otherwise were not serving the public interest, and to seek the modification or termination of those judgments. I coordinated and supervised the work of the more than 300 lawyers of the Antitrust Division as they reviewed some 400 judgments in more than 300 cases, participated in 23 actions to modify or terminate judgments, and prepared for a number of proceedings

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that began after I left the Antitrust Division. Most of my other assignments at the Division also related to litigation.

In my present position as Chief of Staff in the Office of the Chairman of the EEOC, which I assumed in August 1984, I have worked closely with Chairman Thomas, the other Commissioners and the Commission's staff in addressing the issues that have come before the Commission during the past 18 months. Among many other assignments, I have reviewed and discussed with Chairman Thomas scores of recommendations from the Acting General Counsel and our Regional Attorneys concerning new and pending litigation. I have reviewed proposed contracts for expert witnesses and other litigation support. I have come to know the people in our Office of General Counsel. I have learned the mechanics of the Commission's personnel system. In short, I have become intimately familiar with the statutes enforced by the EEOC, with the Commission's current docket, with the capabilities of the Commission's staff, and with the direction in which the present Commissioners want to go -- i.e., toward increased litigation, aggressively pursued. I share their commitment to this approach.

With this experience to guide me, I am confident that if confirmed as General Counsel of the EEOC, I could lead the 268 dedicated lawyers of our Office of General Counsel and district office legal units in vigorous and effective enforcement of Title VII of the Civil Rights Act of 1964, the Equal Pay Act and the Age Discrimination in Employment Act.

Question: You joined the Equal Employment Opportunity Commission in August of 1984. It appears from reviewing the litigation records of the commission since that time, there has been a marked decline in the number of cases, excluding procedural enforcement actions, brought by the Equal Employment Opportunity Commission. What brought about this decline? I would especially appreciate having you comment on the apparent change in the agency's enforcement posture in the area of affirmative relief where discrimination is found and affirmative action plans to rectify past discrimination found by the courts.

Answer: The number of cases filed by the EEOC has increased since I joined the Commission in August 1984:

Cases Filed by the EEOC

	FY 1984	FY 1985	First Quarter FY 1986
Title VII	130	172	57
ADEA	67	96	30
Equal Pay Act	25	18	10
Subpoena Enforcement	88	125	18
Total	310	411	115

Actions to enforce the Commission's subpoenas are critical to the Commission's enforcement effort. We issue a subpoena if during our investigation of a charge filed with us, the respondent employer or labor organization refuses to provide voluntarily the information we need in order to determine whether discrimination occurred. If we do not enforce our subpoenas, respondents will refuse to provide the information we need, and thus make it very difficult, if not impossible, for us to determine whether in any particular situation there was a violation of one of the statutes we enforce. Therefore, the number of subpoena enforcement actions we bring is an important barometer of the seriousness of our determination to enforce the law. I note, however, that even if actions to enforce subpoenas are disregarded, the number of cases filed by the Commission rose from 222 in FY 1984 to 286 in FY 1985; and we filed another 97 cases in the first quarter of FY 1986, which is the largest number of first quarter filings by the Commission ever in its history.

The EEOC continues to seek affirmative relief where discrimination is found. Historically, such relief was sought only in cases alleging a pattern or practice of discrimination.

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However, under the Commission's February 1985 "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination," affirmative relief is now also sought in cases alleging only individual acts of discrimination. I strongly support this new approach, and will seek affirmative relief in all cases if confirmed as General Counsel of the Commission.

JIZ

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The CHAIRMAN. We will reschedule this at the earliest possible convenience and of course try to resolve this. I think you deserve that type of treatment, and you have had 2 days now so let us do the best we can to reschedule.

With that, we will recess until further notice.

[Whereupon, at 11:55 a.m., the committee was adjourned, subject to the call of the Chair.]

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NOMINATION

WEDNESDAY, APRIL 9, 1986

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room SD-430, Dirksen Senate Office Building, Senator Orrin Hatch (chairman) presiding.

Present: Senators Hatch, Kennedy, Metzenbaum, Nickles, Dodd, Kerry, and Simon.

The CHAIRMAN. Today we are meeting again to consider the nomination of Jeffrey Ira Zuckerman to be general counsel of the Equal Employment Opportunity Commission.

We have met on this nomination twice before, and I expect today to be the last day of this hearing.

Again I would like to welcome you back to the committee, Mr. Zuckerman, and we appreciate your patience and forbearance and your cooperation with our procedures. I know this has been a taxing and a difficult process for you but it is, nevertheless, one we have to go through.

I would like to mention that this hearing will be conducted, as were the first two hearings, under the memorandum of understanding concerning the confidential documents received from the Commission in regards to this nomination. So, at this point, I would submit for the record 17 letters from individuals and organizations that have written in regard to Mr. Zuckerman's nomination. These letters are received from the Honorable Claude Pepper, the Honorable Augustus F. Hawkins, the Honorable Peter W. Rodino, Jr., and Hon. Don Edwards, the Pacific Legal Foundation, the Cuban-American National Foundation, the Mountain States Legal Foundation, the Gulf and Great Plains Legal Foundation, Agudeth Israel of America, American G.I. Forum of the United States, National Association of Manufacturers, the Rabbinical Council of America, the National Education Association, the Older Woman's League, the American Association of Retired Persons, Gray Panthers, Women's Legal Defense Fund, and NOW Legal Defense and Education Fund.

These letters, without objection——

Senator METZENBAUM. Is there not one from the American Jewish Congress also?

The CHAIRMAN. I do not have one here, but if we do, we will be happy to put that in the record, if you have a copy of it.

Without objection, we will put all of those letters in the record.

[The letters referred to follow:]

CLAUDE PEPPER, FLORIDA
CHAIRMAN

JAMES J. FLORIO, NEW JERSEY
HAROLD E. FORD, TENNESSEE
MARY ROSE OAKAR, OHIO
THOMAS A. LUKEN, OHIO
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KATHLEEN GARDNER CRAVEN
STAFF DIRECTOR

MELANIE MODLIN
ASSISTANT STAFF DIRECTOR

PETER REMICKE
DIRECTOR OF RESEARCH

JAY CONSTANTINE
BILL HALAMANDARIS
EDWIN M. FULLER, M.D., D.P.H.
CONSULTANTS

(202) 226-3241

U.S. House of Representatives

SELECT COMMITTEE ON AGING
SUBCOMMITTEE ON HEALTH AND LONG-TERM CARE
377 HOUSE OFFICE BUILDING ANNEX 2
Washington, DC 20515

March 17, 1986

RALPH REGULA, OHIO
RANKING MINORITY MEMBER

GEORGE E. W. DITTER, NEW YORK
JIM FOURTER, NEW JERSEY
CLAUDINE SCHNEIDER, RHODE ISLAND
THOMAS J. RIDGE, PENNSYLVANIA
JOHN MCCAIN, ARIZONA
SHERWOOD L. BOEHLERT, NEW YORK
JIM LIGHTFOOT, IOWA
JIM MEYERS, KANSAS
PATRICK L. SWINDALL, GEORGIA
PAUL B. HENRY, MICHIGAN
JIM KOLBE, ARIZONA
MATTHEW J. RINALDO, NEW JERSEY (EX OFFICIO)

MARK BENEDICT, J.D.
MINORITY STAFF DIRECTOR

EDIE LIGHTFOOT
ASSISTANT STAFF DIRECTOR
(202) 226-3343

MAR 25 [illegible]

Dear Orrin:

Your attention to a matter of great importance to older workers, as well as to American workers of all ages, would be greatly appreciated.

I am writing to you regarding the nomination of Mr. Jeffery Zuckerman to the position of General Counsel of the Equal Employment Opportunity Commission. This nomination concerns me because of its possible detrimental effects on the continued vigorous enforcement of the Age Discrimination in Employment Act (ADEA), as well as for the enforcement of other civil rights laws.

The position of General Counsel is critical to the enforcement of the ADEA. Yet, two hearings which have already been held by the Senate Labor and Human Resources Committee clearly disclose the following: that, if confirmed, Mr. Zuckerman will impede current efforts to ensure that the rights of older Americans who choose to remain in the workforce or who do so out of necessity will experience a work environment free of discrimination.

There are other points which merit close scrutiny. During the public hearings which have occurred in connection with his nomination, Mr. Zuckerman has expressed disagreement with the Commission's long-standing policy prohibiting consideration of employees' eligibility for pension benefits as a basis for employment decisions. Regarding that policy, he argues that, when an employer bases an employment decision on the assumption that a lay-off would cause less of a hardship to an employee eligible for a pension than on a younger employee not yet eligible for a pension, pension eligibility should be a valid defense to an action brought pursuant to the ADEA. Mr. Zuckerman has stated his opinion that proof of disparate impact cannot stand as a sole and sufficient basis for proof of unlawful discrimination under the ADEA. He has argued that an employer should be able to lawfully deny pension benefits to employees who work beyond age 65, contending that the ADEA does not require accrual of pension benefits in such circumstances. Also, he has opposed ADEA coverage of apprenticeship programs.

Mr. Zuckerman's position regarding pension-eligible employees would have the entirely unacceptable effect of making older workers vulnerable to mass layoffs on the pretext of their eligibility for pension benefits. His stance regarding the use of disparate impact to prove discrimination under the ADEA would severely limit the present capacity of the Commission to combat patterns and practices having a discriminatory impact on employees working beyond age 65.

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His interpretation of the ADEA as not requiring employers to grant pension benefits to employees who work beyond age 65 in my opinion reveals an underlying attitude of unfairness and is inconsistent with the recent decision of the Equal Employment Opportunity Commission to rescind its previous policy which allowed emploeyrs to deny pension credits to employees who worked beyond age 65. Mr. Zuckerman has used his position as Chief of Staff to delay preparation of regulations implementing the Commission's decision. Indeed, it has been nearly two years since the Commission first voted on the issue of pension accrual, and regulations have not yet been proposed.

Mr. Zuckerman's interpretation of the ADEA as not protecting older Americans against discriminatory and irrational exclusion from apprenticeship programs would lead to the mass exclusion of older workers from training and related benefits provided by apprenticeship programs, limiting their access to often necessary employment opportunities or to employment returning adequate wages. Limited access to such training and benefits has an especially adverse effect on women, many of whom enter the workforce later in life. Again, despite a Commission vote deeming discrimination against older Americans in access to apprenticeship programs to be a violation of the ADEA, little effort has been made to prepare regulations. As Chief of Staff, Mr. Zuckerman is responsible for the issue of the new implementing regulations. I must conclude, as have others knowledgeable about this matter, that his opposition to the Commission's policy has contributed to the lack of progress which I note above.

Also of deep concern to me is Mr. Zuckerman's lack of qualifications for the demanding position of General Counsel of the Equal Employment Opportunity Commission. He has had little experience as a litigating attorney in ADEA or other civil rights cases, or for that matter in any area of the law. He has had minimal experience supervising others, much less a staff as large and dispersed as that of the Commission's General Counsel. To entrust matters of such importance to an individual so conspicuously inexperienced is irresponsible and will likely weaken the vigorous and effective enforcement of this Nation's important employment discrimination laws to which we are entitled.

I am certain you know of my long-standing interest in the rights of older workers. I cannot overemphasize the importance of strong enforcement of age discrimination laws to America's older citizens who remain in the workforce. It makes no sense to entrust responsibility for enforcement of those laws to an individual whose views appear inconsistent with their underlying principles and rationally evolved interpretations. Considering both his views on issues of immense concern to me and other older Americans, as well as his inadequate qualifications, I must conclude that the confirmation of Mr. Jeffery Zuckerman is not in the interest of the Nation. I greatly appreciate your consideration of my views on this subject.

With kindest regards,

Very sincerely,

Claude Pepper
Chairman

Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human
Resources
SD-428
United States Senate
Washington, DC 20510

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MAJORITY MEMBERS
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U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515

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MINORITY—(202) 226-3725

March 4, 1986

Honorable Orrin G. Hatch
U.S. Senate
SR-135 Russell Building
Washington, D.C. 20510

Dear Senator Hatch:

I am writing in regard to the President's announced intention to appoint Mr. Jeffery I. Zuckerman to the position of General Counsel of the Equal Employment Opportunity Commission. This proposed nomination continues a disturbing pattern of appointments of individuals to the Commission who do not possess the qualifications traditionally required of individuals assuming such positions and whose commitment to the cause of equal employment opportunity law enforcement and the affirmative remedies which have been developed to achieve those objectives is, at best, highly questionable.

We are advised by persons who have completed in-depth analyses of Mr. Zuckerman's qualifications and views on EEO law enforcement that not only is he significantly under-qualified for the position to which he has been nominated, his personal philosophy of EEO law enforcement is almost certain to interfere with his discharge of the responsibility to vigorously enforce Title VII, the Equal Pay Act of 1963 and the Age Discrimination in Employment Act of 1967, consistent with the intent of Congress as construed by both the many lower federal courts which have decided discrimination cases and the Supreme Court of the United States.

Mr. Zuckerman, I am told, not only rejects the well-settled Title VII concept of adverse impact as articulated by Justice Burger in Griggs v. Duke Power Company, but also rejects its judicially accepted applicability to cases brought under the Age Discrimination in Employment Act and apparently believes, in disregard of the clear intent of Congress, that because of the economic costs involved, employers should not be required to provide benefits to its employees working beyond age 65. He allegedly has argued that the Equal Pay Act (EPA), which requires, with certain caveats, equal pay for equal work, is not a necessary non-discrimination enforcement tool, that contrary to court decisions, specific intent must be shown in cases brought pursuant to the EPA and that equal pay principles have hurt blacks since employers will only hire black workers if they can be hired for less than white workers. He is opposed to existing confidentiality rules protecting individuals who file complaints under the Equal Pay Act. He has remained adamantly opposed to aspects of the Commission's proposed EPA regulations which are critical to effective enforcement of that law.

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Of major importance is his opposition to the use of statistical evidence to prove a prima facie case of discrimination under Title VII and to the use of goals and timetables as a remedial tool under Title VII. His views on affirmative action contradicts the United Steelworkers of America, AFL-CIO v. Weber decision by the U.S. Supreme Court. I fail to see how he can give the Congress assurances that he will effectively enforce the law if he rejects the use of such tools in all circumstances. Finally, I am told that Mr. Zuckerman has advised the Commission's Chairman that the Equal Employment Opportunity Commision's General Counsel is totally independent and has no obligation to be responsive to the policies of the Commission, the Congress or the Courts. The tenor of this alleged position causes me great concern, but it apparently is consistent with responses given to your Committee during the earlier hearing on this nomination.

As I review Mr. Zuckerman's credentials, I see an individual who has had uc direct involvement in any phase of employment discrimination litigation, who has had no involvement in the trial of such cases (or, for that matter, in the trial of any matters) and who has had no experience whatsoever directing or supervising such litigation. Indeed, all of his experience appears to have been as a subordinate non-litigating attorney -- that is, he has been directed by others. Thus, this nomination constitutes a serious deviation from the tradition of assigning principal responsibility for guiding the pursuit of important federal objectives to highly qulalified individuals experienced in the activites which they will be required to supervise and fully acquainted with the substantive issues which they will be called upon to direct, evaluate and analyze and which will be a basis for their supervisory instructions to staff.

The President, of course, has broad discretion to designate the individuals who will work in his administration. Nevertheless, the Constitution wisely conferred on the Senate the responsibility to ensure that such appointees were competent and willing to enforce the laws of this country consistent with the intent of Congress. While I have rarely interjected my views into the confirmation process, I feel that it is essential that I communicate my strong concerns and reservations regarding the qualifications of this nominee and his willingness to enforce the law.

Sincerely,

Augustus F. Hawkins
Chairman

AFH:ecw

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NINETY-NINTH CONGRESS

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GARNER J. CLINE

ASSOCIATE COUNSEL
ALAN F. COFFEY, JR.

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
Telephone: 202-225-3951

March 20, 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are writing about the pending nomination of Jeffrey I. Zuckerman to be the General Counsel of the Equal Employment Opportunity Commission (EEOC).

Although we support the President's right to nominate persons to serve in the Administration, with the advice and consent of the Senate, we have serious reservations concerning the nomination of Mr. Zuckerman that we wanted to share with the Committee.

Mr. Zuckerman joined the staff of EEOC in August 1984 without prior experience in civil rights. While serving as the Chief of Staff, Mr. Zuckerman appears to have abandoned the principles of the fair employment laws as interpreted by Congress, the courts and the EEOC under both Republican and Democratic administrations.

Most disturbing to us, Mr. Zuckerman flatly opposes the use of affirmative action goals and timetables as a remedy for discrimination. He favors the Acting General Counsel's unilateral decision for EEOC to stop using goals and timetables. This decision is contrary to the well-established position of the EEOC supporting goals and timetables for over the past decade, a position consistently agreed with by the courts.

Mr. Zuckerman's suggestion that minorities and women can overcome discrimination by offering to work for lower wages than white and male employees is troubling. This view is contrary to the spirit of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Although Mr. Zuckerman said that he supports the Equal Pay Act, we are troubled that he has proposed alternatives that are in stark contrast to the law.

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Mr. Zuckerman's disregard for the Age Discrimination Act also raises serious concerns. Mr. Zuckerman contends that it would not violate the Age Act for an employer to lay off employees on the basis of their eligibility for retirement, if the employer's intent was benign. This is contrary to the established EEOC position and the position of the courts of appeal that have ruled on the issue. Imposition of personal interpretation of the Act, in contrast to established EEOC policy and case law, is not proper. Adoption of such an interpretation does not bode well for future enforcement of fair employment law.

The EEOC serves as the lead agency for the enforcement of federal equal employment opportunity laws. For the past 20 years, our nation has made great strides in reducing the barriers of discrimination. The confirmation of Mr. Zuckerman would not appear to further that proud tradition.

Thank you for considering our views.

Sincerely,

Peter W. Rodino

PETER W. RODINO, JR.
Chairman
Committee on the Judiciary

Don Edwards

DON EDWARDS
Chairman
Subcommittee on Civil and Constitutional Rights

cc: The Honorable Robert T. Stafford
The Honorable Dan Quayle
The Honorable Don Nickles
The Honorable Paula Hawkins
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The Honorable Lowell P. Weicker, Jr.
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PACIFIC LEGAL FOUNDATION

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April 1, 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

In regard to the nomination of Jeffrey Zuckerman for the position of General Counsel of the Equal Employment Opportunity Commission (EEOC), I support his confirmation by your committee. As President of Pacific Legal Foundation, a tax-exempt public interest law firm, I am familiar with many of the current issues in employment discrimination.

Mr. Zuckerman's professional qualifications are undeniably impeccable. However, I understand that some members of your committee are concerned about Mr. Zuckerman's interpretation of various employment discrimination laws. Advocating a change in EEOC positions on issues or urging a court to reject the statutory interpretation made by a Court of Appeals for a different circuit is neither good nor bad. Change is a neutral concept. However, the questioning of former policies is essentially beneficial; it results in either a deeper assurance that the law is correctly interpreted and applied or a change for the better. That Mr. Zuckerman questions previously taken positions should be commended. The only issue should be whether his reading of the law is reasonable and best enforces both the letter and the spirit of the law.

Mr. Zuckerman has been challenged on his interpretation of a provision of the Age Discrimination Employment Act. The issue arises when an employer must reduce his work force and chooses to lay off employees who are currently eligible for retirement benefits, rather than employees whose salary is their sole means of support. Such a choice may be a legitimate attempt to minimize the financial hardship of the layoff to the employees. Mr. Zuckerman has suggested that eligibility for retirement benefits may be a "reasonable factor other than age." That one or more Courts of Appeal have rejected his interpretation does not mean that those rulings cannot or should not be challenged, either in another circuit or before the United States Supreme

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Court. Mr. Zuckerman's interpretation is reasonable and should not be cause for undue alarm merely because some courts have rejected his position.

Mr. Zuckerman has also been challenged on his apparent disfavor with the imposition of quotas on employers to achieve racial and gender balances. There is no doubt that victims of employment discrimination should be made whole. However, to require the giving of employment preferences to people based solely on the color of their skin is discriminatory. A label of "affirmative action" or a characterization of the procedure as being "benign" is not determinative of its legality any more than the "separate but equal" laws upheld by the United States Supreme Court in Plessy v. Ferguson were nondiscriminatory because they were considered beneficial to all races. The treatment of people differently because of their race is race discrimination regardless of the announced motive. Treating people differently because of their status as a victim, however, is the underlying premise of all employment discrimination law remedies.

Mr. Zuckerman's interpretation of the use of statistical data to prove employment discrimination has also been challenged. The use of statistics is obviously relevant to the issue of discrimination. However, statistical disparity should not be considered equivalent to discrimination. Disparity should be considered along with evidence of the makeup of the applicant pool, qualifications for employment, and other relevant factors. For instance, assuming that particular qualifications of employment are legitimate, that a disproportionate number of members of a class do not meet the qualifications, should not presume discrimination by the employer. An employer should not necessarily be penalized for society's failure to provide equal education and training. Disparity is certainly relevant, but it should not be conclusive of discrimination.

In conclusion, I wish to urge members of the committee not to become alarmed by Mr. Zuckerman's questioning of past EEOC positions, but rather be encouraged by his reevaluation. Positions taken by any organization, especially one which has a mission as important as the EEOC, should not be taken for granted. The EEOC should not be locked into a position which is contrary to the spirit of the employment discrimination laws, if such a position exists. Mr. Zuckerman demonstrates a commitment

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to the ending of an employment discrimination in American society. If the only reservations about Mr. Zuckerman are those addressed in this letter, I strongly suggest your committee support his confirmation.

Sincerely,

Ronald A. Zumbrun

RONALD A. ZUMBRUN
President

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THE CUBAN AMERICAN NATIONAL FOUNDATION

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January 17, 1986

Hon. Orrin G. Hatch
U.S. Senate
125 R.S.O.B.
Washington, D.C. 20510

Re: Jeffrey Ira Zuckerman

Dear ~~Senator:~~ Orrin:

I am contacting you today to acquaint you with Mr. Jeffrey Zuckerman, whose resume is enclosed.

I do not have the least reservation to recommend Mr. Zuckerman for the Directorship of the U.S. Equal Employment Opportunity Commission, an office for which he is eminently qualified. I am certain that Mr. Zuckerman's educational background and experience make him an outstanding selection for that post.

I am requesting that you please recommend Mr. Zuckerman through the appropriate channels for this position.

Cordially yours,

Jorge L. Mas
Chairman

JLM/ig

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JEFFREY IRA ZUCKERMAN

office: Office of the Chairman
U.S. Equal Employment
Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20507
(202) 634-6700

home: 611 Hillsboro Drive
Silver Spring, Maryland 20902
(301) 649-1729

EMPLOYMENT HISTORY

August 1984 to
present: Chief of Staff, Office of the Chairman,
U.S. Equal Employment Opportunity Commission,
2401 E Street, N.W., Washington, D.C. 20507

-- responsible for the development of policy initiatives for consideration by the Commission, including supervision and coordination of reviews of the Uniform Guidelines on Employee Selection Procedures, EEOC Management Directive 707 ("Affirmative Action Plans for Minorities & Women"), and the Commission's regulations implementing the Age Discrimination in Employment Act of 1967 and the Equal Pay Act of 1963

-- undertake miscellaneous assignments for the Chairman, including reviewing proposed statements of enforcement policy, opinion letters, complaints, appeals, settlements and briefs to be filed as amicus curiae; and liaison with other executive agencies and departments, the Council of Economic Advisers, the Office of Management and Budget, Congressional staffs, and private organizations and individuals interested in equal employment opportunity law and policy

June 1981 to
August 1984: Special Assistant to the Assistant Attorney General,
Antitrust Division, U.S. Department of Justice,
Tenth Street & Constitution Avenue, N.W., Washington, D.C. 20530

-- organized and supervised a review of the over 1300 judgments that had been entered in Government antitrust actions and remained in effect, in order to identify those judgments having anticompetitive effects or for other reasons not in the public interest; supervised staff attorneys in district court and court of appeals proceedings to secure modification or termination of such judgments

-- assisted in drafting the Merger Guidelines of the Department of Justice, and explained the Guidelines at bar association meetings

-- assisted the Assistant Attorney General in his review of the trial record in United States v. International Business Machines Corporation, and participated in district court and court of appeals proceedings following the dismissal of that action (see In re International Business Machines Corporation, 687 F.2d 591 (2d Cir. 1982))

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-- participated in district court proceedings to secure court approval of the agreement under which American Telephone and Telegraph Company divested its local operating companies (see United States v. American Telephone and Telegraph Company, 552 F.Supp. 131 (D.D.C. 1982))

-- small business affairs coordinator for the Antitrust Division; among other responsibilities, served as the Division's liaison with the Small Business Administration, and drafted Section III, "Antitrust Policy and Small Business," of The State of Small Business: A Report of the President, which was transmitted to the Congress in March 1982

-- served on Department of Justice committees that reviewed the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence

-- undertook miscellaneous assignments for the Assistant Attorney General, including reviewing proposed investigations, indictments, complaints, settlements and legislation; and liaison with other divisions of the Department of Justice, other agencies and departments, the Executive Office of the President, Congressional staffs and the Directorate-General for Competition of the Commission of the European Communities

March 1974 to
May 1981: Associate, Sullivan & Cromwell,
125 Broad Street, New York, New York 10004

-- member of the firm's Litigation Group; gained extensive experience with respect to antitrust law, securities law, the duties of corporate directors, commercial torts, contract law, law and other aspects of corporate law

-- also a member of the firm's Takeover Group, a special task force consisting of selected lawyers from the firm's corporate, litigation and tax groups, whose members assisted and represented companies involved in mergers, acquisitions and proxy contests

-- gained substantial trial experience; briefed and argued appeals in federal and state courts; conducted and supervised all types of pre-trial discovery; briefed and argued motions for preliminary and summary relief; and negotiated settlements of cases and disputes

-- represented clients in government investigations, including investigations by the U.S. Department of Justice, the Federal Trade Commission and the Securities and Exchange Commission; advised clients, outside the context of litigation, with respect to antitrust issues, securities law, contract disputes and other legal matters

-- on a voluntary, "pro bono" basis, was a founder, and served on the steering committee, of a legal services organization in New York City; and served as counsel to, or an officer or director of, several charitable and educational organizations

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August 1972
to July 1973: law clerk to the Honorable Robert P. Anderson, Senior United States Circuit Judge, United States Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York, New York 10007

EDUCATION

September 1969
to June 1972: Yale Law School, New Haven, Connecticut 06520
(J.D. 1972)

-- Editor, Yale Law Journal

-- author of "'Preliminary Preliminary' Relief Against Anticompetitive Mergers," 82 Yale L.J. 155 (1972)

September 1965
to June 1969: City College of New York, New York, New York 10031
(B.A., cum laude, with Honors in Economics, 1969)

-- Phi Beta Kappa

-- Treasurer of the Student Government

-- member of the Managing Board, The Campus (student newspaper)

-- LSAT score: 800

PERSONAL

Born January 15, 1950; married, four children

Admitted to practice in New York State; the District of Columbia; the Supreme Court of the United States; the United States Courts of Appeals for the Second, Tenth and District of Columbia Circuits; and the United States District Courts for the Eastern, Northern and Southern Districts of New York, and for the District of Columbia

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MOUNTAIN STATES
LEGAL FOUNDATION

1200 Lincoln Street • Suite 800 • Denver, Colorado 80203 • (303) 861-0244

March 31, 1986

The Honorable Orrin G. Hatch
Chairman
Senate Committee on Labor
Washington, D.C. 20510

Re: Confirmation Hearings of Jeff Zuckerman for General Counsel of Equal Employment Opportunity Commission

Dear Senator Hatch:

For the last nine years, Mountain States Legal Foundation has been active in the area of "reverse discrimination" seeking to insure that the principles of equal opportunity and equal treatment before the law as embodied in the Constitution and our federal laws are respected. Zuckerman's vision of a color-blind legal system is very much in agreement with views of Mountain States Legal Foundation.

His appointment to the position of General Counsel of the Equal Employment Opportunity Commission would be an important step in achieving this goal. Zuckerman is both knowledgeable and well qualified.

I urge his speedy confirmation.

Very truly yours,

David A. Flitner
President

/met

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GULF & GREAT PLAINS LEGAL FOUNDATION

JERALD L. HILL
President

April 4, 1986

Honorable Orrin Hatch
Chairman
Committee on Labor and Human
Resources
United State Senate
135 Russell Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Hatch:

Jeffery I. Zuckerman has played a key role at the Equal Employment Opportunity Commission in the efforts of that agency to represent Americans who experience discrimination. Mr. Zuckerman has shown a deep commitment to insuring that individuals in the workplace are judged on the basis of how they perform rather than their sex, their age, the color of their skin or other irrelevant personal characteristics.

As an organization which has fought for individual rights since we were established in 1976, the Gulf and Great Plains Legal Foundation has been particularly concerned about questions which have been raised by committee members and others regarding Mr. Zuckerman's committment to helping the EEOC fulfill its mandate. Obviously, this is a very sensitive area and the American people deserve a careful, complete and fair evaluation of the President's choice to fill this position.

After reviewing the record of the first two hearings your committee held on Mr. Zuckerman's nomination, it appears clear that some committee members disagree with the President and his nominee on some aspects of the EEOC's enforcement policies -- just as some courts have differed in their interpretation of our civil rights laws. These variations do not demonstrate a lack of commitment to the EEOC's mission or an unwillingness to aggressively strike at discrimination. The present Commission's and Mr. Zuckerman's commitment is evident by merely reviewing the increase in the size of the EEOC caseload in recent months.

The most effective methods to enforce our civil rights laws are debated by various individuals. Emphasis is placed in different areas at different times. Members of this committee, and others concerned with these issues, have a right -- in fact an obligation -- to speak out in the proper forum on these very important matters. Together, through public debate, legislative action, administrative implementation and court

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review, our nation reaches a common understanding of this living, ever-changing organism we call the "law". Particularly in the civil rights area, the law will never be completely settled. For as long as there is hatred and bigotry, there will be found new ways to discriminate and the EEOC will need to adapt its approach to meet this discrimination.

Jeffery Zuckerman has shown himself a highly capable administrator and attorney. He is committed to enforcing the civil rights laws of this nation. He views are legally acceptable and are consistent with the spirit and intent of our laws. They are shared by many Americans, the Commission and apparently the President. This nomination should not be rejected merely because some individuals disagree in certain respects with the Commission's approach. There are many forums for examination of those issues. This confirmation process is not the appropriate setting for such debate. Mr. Zuckerman is a skilled attorney who is committed to fighting discrimination. He is currently enforcing the civil rights laws and is pledged to continue those efforts as general counsel of the EEOC. He is the Commission's choice for this position and he is the President's choice. Mr. Zuckerman should be confirmed by the United States Senate.

I appreciate your consideration of this letter.

Sincerely,

Jerald L. Hill
President

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AGUDATH ISRAEL
OF AMERICA
FIVE BEEKMAN STREET NEW YORK, N. Y. 10038
PHONE (212) 797-1800 CABLE AGUDOMNEWYORK

OFFICE OF THE PRESIDENT

November 12, 1985

Senator Orrin G. Hatch
Chairman
United States Senate
Committee on Labor and
Human Resources
Room 135
Senate Russell Office Building
Constitution Avenue, N.E.
Washington, D.C. 20510

Senator Edward M. Kennedy
Ranking Minority Member
United States Senate
Committee on Labor and
Human Resources
Room 113
Senate Russell Office Building
Constitution Avenue, N.E.
Washington, D.C. 20510

Dear Senators Hatch and Kennedy:

I understand that Jeffrey I. Zuckerman, currently chief of staff of the Equal Employment Opportunity Commission, has been nominated for the position of EEOC General Counsel. I write to urge your support for Mr. Zuckerman's nomination and to appeal to you to see to it that the Committee on Labor and Human Resources acts on the nomination as expeditiously as possible.

Mr. Zuckerman's record on the issue of equal employment opportunity is impeccable. We at Agudath Israel of America, founded in 1922 and today the nation's largest grassroots Orthodox Jewish movement with 19 divisions and chapters in 30 states, strongly support Mr. Zuckerman's commitment to the noble ideal of judging persons as individuals rather than as members of certain favored groups.

DIVISIONS National Youth Commission Zeirei Agudath Israel, Bnos Agudath Israel, Pirchei Agudath Israel, Bachurim Agudath Israel/Agudist Women's Organization Ma'ayanei Agudath Israel/Camp Agudah/Camp Bnos/ The Jewish Observer/Dan Yiddishe Vort/Commission on Legislation and Civic Action/Commission on Israel/Commission on Overseas Rescue and Relief/Commission on Social Services/Commission on Senior Citizens/ Project COPE (Career Opportunities and Preparation for Employment)/COPE Vocational Institute/Commission on Latin American Jewry/Historical Commission on Jewish Ethnic Affairs Oudoorsage, Southern Brooklyn Community Organization/Commission on Branch Services and Development/ Commission on Adult Torah Education Dial Torah/ Jewish Education Program (JEP)/Torah Education Network (Reshet Shavrei Torah)/Torah Action Program (TAP) /Project RISE (Russian Immigrant Services and Education) /Russian Immigrant Rescue Fund/Project YAD for Russian Jewry/Agudist Bereavement Service/Chevra Chesed Shel Emes

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The Jewish community in general, and the Orthodox Jewish community in particular, has too long suffered from policies that arbitrarily restrict employment opportunities on the basis of such irrelevant characteristics as race, gender, national origin or creed. Mr. Zuckerman, himself a member of our community, is a thoughtful and principled advocate for equal opportunity for all Americans.

Once again, I urge you to act expeditiously upon the nomination of Jeffrey Zuckerman, and to recommend him for confirmation by the full Senate.

Sincerely,

Rabbi Morris Sherer
President

MS:dj

cc: Members of the Senate Committee on Labor and Human Resources

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AMERICAN GI FORUM
OF THE UNITED STATES

P.O. BOX 3012
EL PASO, TEXAS 79923
PHONE (915) 772-1442

OFFICE OF THE
NATIONAL CHAIRMAN

February 5, 1986

The Honorable Orrin G. Hatch
United States Senate
135 Senate Russell Office Buildiing
Washington, D.C. 20510

Dear Senator Hatch:

The American GI Forum is pleased to take this opportunity to support the candidacy of Mr. Jeffrey I. Zuckerman to be appointed to the position of General Council in the Department of Equal Employment Opportunity Commission.

Mr. Zuckerman has served with great distinction in the position of Chief of Staff and various other positions. He has demonstrated his fine professional skills as well as profound knowledge and sensitivity to the host of social issues that often affect the commission.

Mr. Zuckerman possesses a warm personality which compliments his keen sense of dedication, dignity, fairness and innate ability to work with and for people and always searching to strike the balance of pure, just and sound judiciary.

With best wishes,

Sincerely,

Eduardo Bernaldez
National Chairman

EB:mep

Education Is Our Freedom, and Freedom Should Be Everybody's Business

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National Association
of Manufacturers

RANDOLPH M. HALE
Vice President and Manager
Industrial Relations Department

December 10, 1985

The Honorable Orrin G. Hatch
Chairman
Committee on Labor & Human
Resources
United States Senate
135 Russell Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the National Association of Manufacturers, I urge you to confirm Jeffrey Zuckerman as general counsel of the Equal Employment Opportunity Commission. He would bring an extensive and impressive legal background to the position, as well as a commitment to enforcement of our nation's civil rights laws.

His legal background includes seven years experience with the prestigious New York law firm of Sullivan and Cromwell after graduating from Yale Law School in 1972.

After leaving private practice, he served very capably as the special assistant attorney general in the antitrust division of the U.S. Department of Justice. Mr. Zuckerman's government service also includes his most recent experience as chief of staff of the EEOC.

His close ties with the EEOC members and staff, as well as an understanding of the Commission's responsibilities, make him the ideal candidate to serve as general counsel.

Thank you for your consideration of our views on this important nomination.

Sincerely,

1776 F Street, N.W.
Washington D.C. 20006
(202) 637-3000

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הסתדרות הרבנים דאמריקה

RABBINICAL COUNCIL of AMERICA

275 SEVENTH AVENUE • NEW YORK, N.Y. 10001 • (212) 807-7888 Cable HISRABONIM, N.Y.

1985 NOV 22 PM 12:43

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November 19, 1985

NOV 26

Senator Orrin G. Hatch, Chairman
United States Senate
Committee on Labor and Human Resources
Dirksen Senate Office Building, Room 428
Washington, D. C. 20510

Dear Senator Hatch:

I am writing to urge the prompt confirmation and the nomination of Mr. Jeffrey I. Zuckerman as Chief Counsel of the Equal Employment Opportunity Commission. Mr. Zuckerman is known to me and the Rabbinical Council of America personally. We consider him to be a young man of exceptional talent and ability whose integrity is beyond question. We are certain that he will fulfill his task as General Counsel with understanding and sensitivity to the intent of the work of the Commission, and with the moral commitment to give equal treatment to all citizens of our great country.

With appreciation for your kind attention to this matter, and with best wishes, I am

Sincerely yours,

Rabbi Binyamin Walfish
Executive Vice-President

BW:sr
cc:
Senator Robert T. Stafford
Senator Dan Quayle
Senator Don Nickles
Senator Paula Hawkins
Senator Strom Thurmond
Senator Lowell P. Weicker
Senator Malcolm Wallop
Senator Charles E. Grassley
Senator Edward M. Kennedy
Senator Claiborne Pell
Senator Howard M. Metzenbaum
Senator Spark M. Matsunaga
Senator Christopher J. Dodd
Senator Paul Simon
Senator John F. Kerry

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nea
NATIONAL EDUCATION ASSOCIATION • 1201 16th St., N.W., Washington, D.C. 20036-3290 • (202) 822-7300
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KEITH GEIGER, Vice President
ROXANNE E. BRADSHAW, Secretary-Treasurer
GOVERNMENT RELATIONS/POLITICAL AFFAIRS
Kenneth F. Melley, Director
DON CAMERON, Executive Director

March 19, 1986

MAR 24 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
135 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I am writing on behalf of the National Education Association to express our opposition to the nomination of Jeffrey I. Zuckerman for General Counsel of the Equal Employment Opportunity Commission (EEOC).

While the NEA believes that Presidents have the right to nominate individuals for Executive branch appointments who hold positions consistent with their political philosophy, we question Mr. Zuckerman's commitment to vigorous enforcement of existing Federal anti-discrimination laws.

The General Counsel of EEOC plays a critical role in the enforcement of a variety of civil rights statutes, including Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, and the Rehabilitation Act. It is vital that whoever fills this position possess an unswerving commitment to these statutes and court decisions regarding their interpretation.

We are particularly disturbed by certain actions taken by Mr. Zuckerman during his tenure as Chief of Staff at EEOC and by statements he made during the two days of hearings held by the Labor and Human Resources Committee.

Mr. Zuckerman on March 4 confirmed that while at EEOC he wrote in a draft report that protected classes such as women and minorities could overcome employment discrimination if they accepted lower wages than white male employees. Statements such as this evidence a complete disregard for the principles underlying the Equal Pay Act and Title VII.

Equally disturbing is Mr. Zuckerman's rejection of the concept of "adverse impact" as proof of discrimination under the Age Discrimination in Employment Act. He implied that the ADEA addresses only intentional discrimination. This position is contrary to existing EEOC regulations and judicial interpretation.

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NEA also is appalled by Mr. Zuckerman's testimony and written memoranda he prepared for the EEOC Chairman that "pension eligibility" is a valid criterion for determining layoffs. Once again this is counter to longstanding EEOC policy and rulings by three different circuit courts of appeal.

NEA has a longstanding commitment to civil rights and the elimination of discrimination against any individual. Based on the above examples we seriously question Mr. Zuckerman's commitment to these principles and urge you to reject his nomination to the position of General Counsel of the EEOC.

Sincerely,

Kenneth F. Melley
Director of Government Relations/
Political Affairs

KFM:jyc

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Older Women's League
NATIONAL OFFICE
1325 G Street, N.W., Lower Level B, Washington, DC 20005
(202) 783-6686

MAR 07 1986

Lou Glasse
President

Dorothy Pitts
Vice President

Janet Good
Secretary

Phyllis Borzi
Treasurer

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Patricia A. Ruh
Denver, CO

Phyllis Sanders
Philadelphia, PA

Jeanne Scher
Marietta, GA

Laurie Shields
Oakland, CA

Victoria Jaycox
Executive Director

March 3, 1986

The Hon. Orrin G. Hatch
Committee on Labor and Human Resources
428 Dirksen Senate Building
Washington, DC 20510

Dear Senator Hatch:

I am writing to express the strong opposition of the Older Women's League (OWL) to the nomination of Jeffrey I. Zuckerman as general counsel of the Equal Employment Opportunity Commission.

For the past several years, OWL has watched in dismay as the EEOC has begun a series of sharp reversals of policies that are absolutely essential to the enforcement of civil rights laws, including the Age Discrimination in Employment Act, the Equal Pay Act, and Title VII of the Civil Rights Act.

The position of general counsel of the EEOC is meant to act as a check on the EEOC chairman, and to insure that their policies confirm with the law. Recent testimony of Mr. Zuckerman at his confirmation hearings indicate that he will act instead as a rubber stamp for Chairman Thomas, and that his views on the legality or illegality of a number of employment practices have little or nothing to do with the law that EEOC is supposed to enforce, or the interpretation of that law by the courts.

Midlife and older women in this country currently have little enough protection against employers who find them "unqualified" because of their age, or who pay them less than their male counterparts, or find them easily expendable. Mr. Zuckerman's nomination puts the employment prospects of these women in even greater peril. His espousal of the notion that women and minorities should offer to work for lower wages as a means of combatting job discrimination is an outrage.

For these reasons, Mr. Zuckerman's nomination is not acceptable to the Older Women's League and should not be acceptable to the Committee on Labor and Human Resources of the United States Senate.

Sincerely,

Victoria Jaycox

Victoria Jaycox
Executive Director

AARP

March 6, 1986

The Honorable Orrin G. Hatch
Committee on Labor and Human Resources
United States Senate
Washington, DC 20510

Dear Mr. Chairman: MAR . . 198

The American Association of Retired Persons, which represents over 22 million working and retired persons 50 years of age and over, urges you to oppose the nomination of Jeffrey I. Zuckerman for General Counsel of the Equal Employment Opportunity Commission.

The General Counsel plays a critical role in the enforcement of the Age Discrimination in Employment Act (ADEA) and other anti-discrimination laws under the Commission's jurisdiction. In order for the EEOC to fulfill its mandate to vigorously enforce and protect the rights of persons who have been victims of employment discrimination, the position of General Counsel must be filled by an individual whose interpretation of the law is fully in accord with Commission policy and court decisions.

In public statements during the first two days of his confirmation hearing (December 10, 1985 and March 4, 1986), in meetings with representatives from AARP, and through his actions as Chief-of-Staff for EEOC Commissioner Clarence Thomas, Mr. Zuckerman has expressed such fundamental disagreement with Commission policies and legal precedent that the rights of older workers to be free from age discrimination would be dramatically compromised by his appointment to General Counsel. The Association is thus forced to question Mr. Zuckerman's commitment to effective enforcement of the ADEA and other employment discrimination laws.

The following discussion supports this conclusion.

1. Pension eligibility as a basis for termination/lay-off.

Long-standing EEOC policy interprets the ADEA as prohibiting the use of "pension eligibility" as a basis for termination or lay-off of an employee. The EEOC has sucessfully argued in numerous U.S. Courts of Appeals that using "pension eligibility" as a basis for employment decisions violates the ADEA. The EEOC has never changed or otherwise indicated any dissatisfaction with this interpretation of the statute.

In Mr. Zuckerman's statements at his confirmation hearings and and in a memorandum he prepared for EEOC Commissioner Thomas that was discussed at the first hearing, Mr. Zuckerman argued that, contrary to existing policy and law, there are circumstances under which pension eligibility should be a defense under the ADEA: specifically, when an employer determines that being laid-off would be less economically

burdensome for a pension-eligible employee than for a younger worker who is not yet eligible for retirement benefits. He made this argument in the context of a case pending within the jurisdiction of the United States Court of Appeals for the 3rd Circuit, notwithstanding law to the contrary in that circuit.

Mr. Zuckerman's anomalous interpretation of the ADEA in this regard would open the door for wide-scale lay-offs of older workers on the pretext of their eligibility for a pension. It may also result in a laid-off worker having to prove an employer's discriminatory "intent," notwithstanding the Supreme Court's rejection of such a requirement under the statute.

2. Use of "Disparate Impact" to Prove Age Discrimination in Employment

Because age discrimination is often subtle and difficult to prove, evidence of the disproportionate impact of an ostensibly neutral employment practice is often the only proof available of discriminatory practices. "Disparate impact" is therefore an accepted standard for proving ADEA cases and is in accord with the Supreme Court's determination that plaintiffs need not prove an employer's discriminatory intent.

Once again, contrary to EEOC and judicial interpretation, Mr. Zuckerman testified at his confirmation hearing and has otherwise stated that he does not believe proof of "disparate impact" can be the sole basis for liability under the ADEA. He has further implied that the ADEA addresses only intentional discrimination. The Association must therefore conclude that Mr. Zuckerman, in his exercise of discretion as General Counsel, will recommend that the EEOC not pursue the large number of ADEA cases in which the best or only evidence of an employer's discriminatory practices is evidence of "disparate impact."

3. Post-65 Pension Benefit Accrual

In June 1984, and then again in March 1985, the Commissioners of the EEOC voted to rescind previous policy allowing employers to deny pension credits to employees who work beyond age 65. As he testified at his confirmation hearing, Mr. Zuckerman argued against this change in policy and, notwithstanding the Commissioners' two votes to the contrary, continues to argue that the ADEA does not require post-65 pension accrual. However, as Chief-of-Staff, Mr. Zuckerman assumed responsibility for the preparation of these regulations and related materials for EEOC Commissioner Thomas.

It is now almost two years since the initial vote by the EEOC Commissioners and no regulations have been even proposed. Although Mr. Zuckerman testified that completion of a regulatory impact analysis has caused the delay, the EEOC waited almost seven months after the Commissioners' vote approving the draft regulations before requesting proposals to prepare this analysis. Mr. Zuckerman has

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offered no other reason for the extraordinary delay in preparing these regulations and related materials. Furthermore, the EEOC has failed to provide any notice to employers that the original policy permitting them to freeze pension credits for workers older than 65 years of age may no longer be relied upon. The result is that older workers are losing millions of dollars in pension benefits in a manner that the EEOC has determined is contrary to the law.

4. Apprenticeship Programs and the ADEA

In June 1984, the Commissioners of the EEOC voted to reverse existing regulations that exempt apprenticeship programs from coverage of the ADEA. The previous policy not only denied older persons the valuable training and other benefits provided by apprenticeship programs, but had an especially adverse effect on the ability of women, many of whom enter the workforce at a later age, to obtain employment. Proposed new regulations were submitted to OMB for review in July 1984. Due to a dispute with the Department of Labor, OMB indicated in September 1984 that it would not approve the proposed regulations.

Mr. Zuckerman has once again expressed his disagreement with the Commissioners' vote to change the policy on apprenticeship programs. Once again, as Chief-of-Staff, Mr. Zuckerman assumed responsibility for the issuance of the new regulations. In the past 18 months, however, the EEOC has taken minimal action to advance its own proposal. Mr. Zuckerman has provided no satisfactory explanation for his failure to move these regulations forward through OMB or to otherwise resolve the dispute with the Department of Labor.

In light of Mr. Zuckerman's disagreements with the EEOC's new policies regarding both post-65 pension accrual and ADEA coverage of apprenticeship programs, it is hard to escape the conclusion that his positions on these issues have contributed to the delay in promulgation of new regulations.

The Association is concerned that Mr. Zuckerman's fundamental disagreements with so many of the issues critical to the effectiveness of the ADEA will similarly color his enforcement of that statute. AARP must therefore oppose Mr. Zuckerman's nomination on the grounds that his commitment to vigorous and effective enforcement of the Age Discrimination in Employment Act and other laws prohibiting employment discrimination is questionable at best.

We will be happy to discuss any or all of the above issues in greater detail with members of the Senate Committee on Labor and Human Resources and their staffs.

Very truly yours,

Cyril F. Brickfield
Executive Director

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AARP

April 23, 1986

The Honorable Orrin G. Hatch
Chairman, Committee on Labor & Human Resources
U.S. Senate
Washington, D.C. 20510

RE: Jeffrey I. Zuckerman
Corrections to the Record, April 9, 1986 Confirmation Hearing

Dear Chairman Hatch:

The American Association of Retired Persons (AARP) requests that this letter be made part of the record of the confirmation hearings of Jeffrey I. Zuckerman for the position of General Counsel of the Equal Employment Opportunity Commission (EEOC) before the U.S. Senate Committee on Labor & Human Resources. The purpose of this letter is to correct misstatements made by Mr. Zuckerman at his confirmation hearing on April 9, 1986, concerning AARP's opposition to his confirmation.

1. Mr. Zuckerman's Role in the Development of Rules Requiring Post-65 Pension Benefit Accrual.

In response to questions posed by Chairman Hatch (Tr., April 9, 1986, at 8-9), Mr. Zuckerman denied having any "responsibility" for the development or issuance of regulations requiring post-65 pension benefit accrual, or any related conversations with EEOC Acting Legal Counsel. Mr. Zuckerman stated that his sole "responsibility" with regard to these regulations was preparation of EEOC Chairman Clarence Thomas' regular overview for the Office of Management and Budget (OMB) of pending EEOC regulatory activities for inclusion in the President's regulatory programs. (Tr., April 9, 1986, at 9-10). This is inaccurate. Regardless of whether Chairman Thomas formally delegated responsiblity to Mr. Zuckerman, it is clear that from the date of his arrival at the EEOC, Mr. Zuckerman played a signficant role in the development of the rules and coordination with OMB and other Executive Branch agencies.

Mr. Zuckerman was in constant communcation, both oral and written, with those persons in the Office of Legal Counsel who were preparing the proposed regulations and accompanying memoranda for consideration by the Commissioners. He prepared memoranda on substantive issues of law with regard to this issue for the Chairman's signature; was the recipient of responsive memoranda from the Office of Legal Counsel (See Attachment I); spoke regularly to the Chairman and other Commissioners about this issue and was one of a group of persons who briefed the Commissioners prior to their second vote in March 1985 (Tr., March 4, 1986, at 30-32); and took responsiblity for coordination of these rules with OMB and other federal agencies, as is evidenced both by his meetings and correspondence with OMB (See Attment II), and meetings with other federal agencies and/or the Executive Branch. (See Attachment III) (Tr., March 4, 1986, at 40-48).

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AARP reasserts its belief that Mr. Zuckerman's personal disagreement with the Commissioners' votes to require post-65 pension benefit accrual was a major factor delaying the issuance of new rules.

2. Mr. Zuckerman's Conversation with John Rother (Director, Legislation, Research & Public Policy, AARP) Regarding AARP's Letter to Chairman Hatch of March 6, 1986

In response to questions posed by Senator Metzenbaum, Mr. Zuckerman described a conversation he had with John Rother of AARP on March 5, 1986, the day before AARP submitted to the Labor & Human Resources Committee its letter in opposition to Mr. Zuckerman's confirmation as General Counsel. Mr. Zuckerman stated that Mr. Rother was surprised to hear that there were mistaken facts in the letter and "had not realized that I [Mr. Zuckerman] had not been responsible for drafting the pension benefit accrual regulations" or the regulations requiring coverage of apprenticeship programs by the Age Discrimination in Employment Act. Mr. Zuckerman stated that the final letter of March 6, 1986, still contains many of these "factual misstatements." (Tr., April 9, 1986, at 76-77).

Mr. Zuckerman inaccurately described his conversation with Mr. Rother and the content of AARP's letter of March 6, 1986. First, neither Mr. Rother nor AARP ever asserted that Mr. Zuckerman was responsible for drafting the pension accrual regulations. See Letter, Cyril Brickfield, Executive Director, AARP, to Chairman Orrin G. Hatch (and members of the U.S. Senate Committee on Labor & Human Resources, U.S. Senate), March 6, 1986, p. 2 (Not changed subsequent to Mr. Rother's conversation with Mr. Zuckerman). Second, Mr. Rother and AARP were well aware, prior to Mr. Rother's conversation with Mr. Zuckerman, that the apprenticeship regulations were already drafted and sent to OMB before Mr. Zuckerman's arrival at the EEOC. Mr. Zuckerman, however, has since played a major role in EEOC's coordination with OMB on these regulations and effectively assumed responsibility for their issuance. See Letter, March 6, 1986, p. 3 (Not changed subsequent to Mr. Rother's conversation with Mr. Zuckerman). These regulations have yet to be issued and AARP reasserts its belief that Mr. Zuckerman personal disagreement with the new policy has been a major cause of delay.

During his March 5, 1986 conversation with Mr. Zuckerman, Mr. Rother stated that AARP would re-check the disputed facts. AARP discovered only one error: Although the EEOC had taken only "minimal" action to advance its proposal regarding the apprenticeship rules at OMB, it could not accurately be said to have taken "no" action. Accordingly, AARP changed its letter before delivering it to the members of the Senate Committee. See Letter, March 6, 1986, p. 3.

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AARP has once again re-checked its facts and finds no basis for changing its letter of March 6, 1986. Mr. Zuckerman played a major role in the development and subsequent delay in issuance of new rules requiring post-65 pension benefit accrual and coverage of apprenticeship programs by the Age Discrimination in Employment Act. In so doing, he frustrated the will of the Commission and has demonstrated his lack of committment to vigorous support of the Age Discrimination in Employment Act and other laws prohibiting employment discrimination.

Please call me if you have any questions on these matters.

Very truly yours,

John Rother

John Rother
Director, Division of Legislation,
Research & Public Policy

Enclosures
cc: Senator Robert T. Stafford
Senator Dan Quayle
Senator Don Nickles
Senator Paula Hawkins
Senator Strom Thurmond
Senator Lowell P. Weicker
Senator Malcolm Wallop
Senator Charles E. Grassley
Senator Edward Kennedy
Senator Claiborne Pell
Senator Howard M. Metzenbaum
Senator Spark M. Matsunaga
Senator Christopher J. Dodd
Senator Paul Simon
Senator John F. Kerry

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AGE AND YOUTH IN ACTION

GRAY PANTHERS

PROJECT FUND

March 12, 1986

Orrin G. Hatch, Chairman
Committee on Labor and Human Resources
SD-428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Gray Panthers is a national organization of 70,000 members and supporters who advocate for human rights and oppose discrimination based on any factor of human condition including age. We have grave concerns regarding certain positions taken by Jeffrey I. Zuckerman, General Counsel nominee of the Equal Employment Opportunity Commission (EEOC).

Our concerns are:

1. His position that companies may legally dismiss workers based on their eligibility for retirement benefits.

2. His "serious reservations" about recent court decisions that hold that employment practices having an adverse impact on older workers can constitute age discrimination, apart from an employer's actual intent to discriminate, which is current EEOC policy.

3. His involvement in opposition to an EEOC action in June, 1984 to rescind an old Department of Labor interpretation that permits employers to stop making pension contributions for workers past the age of 65. As a result that change has never gone into effect and has been subject to infinite delay.

We believe that the position of General Counsel requires someone who will thoroughly and aggressively enforce laws protecting human rights. The positions listed above, and attributed to Mr. Zuckerman, weaken those protections, and are therefore in conflict with the goals of EEOC. Unless Mr. Zuckerman can provide concrete assurances to the contrary, his nomination is inappropriate.

Sincerely,

Frances J. Humphreys

Frances J. Humphreys
Washington Representative

cc: Maggie Kuhn

FJH/ael

NATIONAL GRAY PANTHERS / Washington, D.C. Office:
806 15th Street, N.W. • Suite 430 • Washington, D.C. 20005 • (202) 783-6226

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Women's Legal Defense Fund
2000 P Street, N.W. • Suite 400 • Washington, D.C. 20036 • 202/887-0364

March 3, 1986

The Honorable Orrin G. Hatch
135 Russell Senate
Office Building
Washington, D.C. 20510

Re: Nomination of Jeffrey A. Zuckerman for General Counsel, EEOC

Dear Senator Hatch:

As you know, Mr. Zuckerman has been nominated for the position of General Counsel of the Equal Employment Opportunity Commission. This letter sets forth the position of the Women's Legal Defense Fund regarding that nomination.

The Women's Legal Defense Fund is a private, non-profit organization founded in 1971 in Washington, D.C. WLDF maintains as a primary goal the elimination of discrimination on the basis of sex. Among the activities pursued by WLDF are counseling and representing individual women with employment discrimination problems. In addition, during the past eight years, WLDF has been involved in the monitoring of the performance of federal agencies charged with the enforcement of equal employment opportunity laws. We are concerned that the confirmation of Mr. Zuckerman as EEOC General Counsel would have serious negative consequences on the status of women in the workplace as well as the efforts of government agencies to improve that status.

As a preliminary matter, we understand that Mr. Zuckerman has prepared written analyses of the laws enforced by the EEOC which presumably outline his vision of how those laws should be enforced. Because those documents are available only to Senate staff, we have not had the opportunity to review those documents. As there has not been an opportunity for all of Mr. Zuckerman's positions to be placed on the record, it is crucial that members of the Labor and Human Resources Committee determine in detail all of his views regarding the enforcement of Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act, and the Rehabilitation Act. If Mr. Zuckerman's views, when fully explored, are antithetical to tough EEO enforcement, then Mr. Zuckerman should not become General Counsel of the Equal Employment Opportunity Commission. We shall, of course, monitor that hearing and will review our position in light of what we learn there.

Our concerns about Mr. Zuckerman stem primarily at the December 10, 1985 hearing, on his confirmation. At the hearing, Senators Dodd and Metzenbaum questioned Mr. Zuckerman regarding some of his positions on the Age Discrimination in Employment Act.

He responded that worker eligibility for retirement was a "reasonable factor other than age", and thus a valid defense under the ADEA. Such a position is contrary to established judicial precedent and to EEOC policy. Mr. Zuckerman also indicated that he had reservations whether disparate impact should be considered evidence of age discrimination. Given that the policies and in some cases, the language of other anti-discrimination laws are so similar to the ADEA, it is likely that Mr. Zuckerman interprets other EEO laws in the same manner.

Another major source of concern about Mr. Zuckerman as General Counsel involves his position on the use of affirmative action goals and timetables as remedies for discrimination. Contrary to EEOC support for goals and timetables in Republican and Democratic administrations, and to current EEOC affirmative action guidelines which encourage their use by employers, the current EEOC Acting General Counsel has directed EEOC regional attorneys not to recommend to Headquarters any settlement decrees that included affirmative action goals and timetables. Moreover, in Local 28, Sheet Metal Workers v. EEOC, recently argued before the Supreme Court, the Acting General Counsel took the position that a 29% goal imposed by the court was illegal. The goal was aimed at the hiring and training of minority workers by a union that had intentionally excluded those workers for years. Mr. Zuckerman opposes goals and timetables, and supports the Acting General Counsels' about-face on policy which has not only had the support of the Commission for years, but which also has been recognized by the courts.

Affirmative action measures, including goals and timetables, are crucial in advancing the employment status of women and minority males. The refusal by the EEOC to use race and gender conscious measures thus removes from the arsenal of weapons used to fight employment discrimination those that have proven the most effective. Such a change will be ruinous to the continued advancement of women and minority males in the American workplace. Mr. Zuckerman should not be in a position from which he can orchestrate such a change unilaterally.

Another area in which Mr. Zuckerman's restrictive interpretations may impede the achievement of equal employment opportunity involves that of discriminatory job selection devices. In an overview of EEOC's regulatory agenda that was submitted to OMB in February 1985, Chair Thomas criticized the Uniform Guidelines on Employee Selection Procedures (UGESP), which provide, among other things that employment requirements which exclude a disproportionate number of minority males or women may constitute discrimination unless related to job performance. The Overview incorrectly claims that UGESP requires the application of "mechanical statistical rule[s]" and "assume[s] the inherent inferiority of blacks, hispanics and women." It is our understanding that the Overview was prepared under Mr. Zuckerman's supervision as Chief of Staff, and that he agrees with its positions. As EEOC General Counsel, he would have the opportunity to advance this interpretation of the Guidelines in the courts, to the detriment of equal employment opportunity.

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WLDF believes that the foregoing is sufficient to require close scrutiny of Mr. Zuckerman during the confirmation process. However, we commend to your attention as well other areas in which we have some concerns. The Overview to which we referred earlier also calls for a review of regulations interpreting and enforcing the Equal Pay Act of 1963. We are also interested in learning Mr. Zuckerman's views regarding sex-based wage discrimination under Title VII of the Civil Rights Act.

We look forward to a close examination of the issues related to the confirmation of Jeffrey Zuckerman. If Mr. Zuckerman does not believe in the fundamental purposes of the laws regarding employment discrimination, then he should not be confirmed.

Sincerely,

Judith L. Lichtman
Executive Director

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Women's Legal Defense Fund
2000 P Street, N.W. • Suite 400 • Washington, D.C. 20036 • 202/887-0364

April 7, 1986

The Honorable Orrin G. Hatch
135 Senate Russell Office Building
Washington, D.C. 20510

Re: Nomination of Jeffrey Ira Zuckerman
for General Counsel, EEOC

Dear Senator Hatch:

As you know, the Women's Legal Defense Fund wrote to you on March 3, 1986 to state our position regarding the nomination of Mr. Zuckerman as General Counsel of the Equal Employment Opportunity Commission. We noted in that letter our fear that his confirmation would have a negative impact on the status of women in the workplace. We stated that if further exploration of Mr. Zuckerman's views revealed that such views are antithetical to tough enforcement of the EEO laws, then he should not be confirmed. Some of the other organizations that are signatories to this letter have also sent earlier letters which detailed their concerns.

We monitored the hearing on March 4, 1986, and listened as Mr. Zuckerman explained in greater detail his positions on issues of importance to our constituencies. Based on our observation of that March 4th hearing, our earlier position has not changed; indeed, we are now convinced that Jeffrey Zuckerman's confirmation would be a serious mistake.

Jeffrey Zuckerman's views concerning the Equal Pay Act are nothing short of frightening. The Equal Pay Act was"...intended by Congress to be...a broad charter of women's rights... It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards for female workers and the economic and social consequences which flow from it." Schultz v. Wheaton Glass Co., 9 FEP Cases 502, 507 (3d Cir. 1970).

We therefore find it offensive that in a discussion of the Equal Pay Act, a senior official of the Equal Employment Opportunity Commission should be contemplating, in any context, the view that women, as members of a "disfavored" group, should be paid less than men for their services. When the views come from an individual who is currently Chief of Staff for Chairman Clarence Thomas, and who, if confirmed, will be responsible for conducting litigation on behalf of the Commission, including Equal Pay Act litigation, we are appalled. Women can have no

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confidence in an agency run by individuals who question their right to be paid fairly.

We reaffirm our position that Mr. Zuckerman's view of the use of goals and timetables and other race-and gender-conscious measures is wrong. In refusing ever to take race or sex into consideration in devising remedies for employment discrimination, Mr. Zuckerman is ignoring the law as interpreted by the Courts, as well as the history of pervasive sex and race discrimination in this country. While he is certainly entitled to such an opinion, Mr. Zuckerman should not be confirmed to a job where he is the major law enforcement official for the federal agency primarily responsible for eliminating employment discrimination.

For the foregoing reasons, as well as for the reasons stated in our earlier letters, it is our position that Jeffrey Zuckerman should not be confirmed as General Counsel of the Equal Employment Opportunity Commission.

Sincerely,

Judith L. Lichtman/cw
Judith L. Lichtman
Executive Director
Women's Legal Defense Fund

Nancy Kreiter/cw
Nancy Kreiter
Research Director
Women Employed

Cindy Marano/cw
Cindy Marano
Executive Director
Wider Opportunities for Women

Marsha Levick/cw
Marsha Leuick
Legal Director
NOW Legal Defense and
Education Fund

Linda B. Berg/cw
Linda B. Berg
Counsel
National Organization for Women

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Legal Defense and Education Fund
99 HUDSON STREET • NEW YORK, NY 10013 • (212) 925-6635

MAR 11 1986

February 27, 1986

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Legal Director

* Organizational affiliation for purpose of identification only

Honorable Orrin G. Hatch
135 Senate Russell Office Building
Washington, D.C. 20510

Re: Confirmation of Jeffrey Ira Zuckerman

Dear Senator Hatch:

The NOW Legal Defense and Education Fund ("NOW LDEF") and the National Organization for Women ("NOW") have serious reservations concerning the nomination of Jeffrey Zuckerman for the position of General Counsel of the Equal Employment Opportunity Commission. Although we do not have available to us all of the documents available to the Senate staff, based upon the information which we do have we believe that Mr. Zuckerman would fail to enforce the civil rights laws in a manner consistent with the intent of Congress. If the testimony elicited at the March 4 hearing confirms our belief, we urge you to vote against the confirmation of Mr. Zuckerman to a position from which he could reverse the gains that have been made by women and minorities to date.

Mr. Zuckerman opposes the use of affirmative action goals for remedying discrimination. Moreover, he supports the Acting General Counsel's unilateral reversal of the well-established EEOC position supporting affirmative action goals. The EEOC has recognized for over a decade and through four administrations the necessity for numerical objectives for affirmative action. The Courts have agreed with the established EEOC position. Mr. Zuckerman should not be placed in a position to

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impose unilaterally his opposition to affirmative action goals which have so effectively served to break down barriers to equal employment opportunity. It is largely as the result of the implementation of affirmative action plans that women have made inroads into the paid labor force. Only with the continued implementation of such plans will women have any chance of achieving full economic parity with men.

Additionally, Mr. Zuckerman's testimony regarding the Age Discrimination in Employment Act reflects his disagreement with basic fair employment principles. Mr. Zuckerman testified that, if done with a "benign" intent, employers could layoff workers on the basis of their eligibility for retirement without violating the Age Act. As might be expected, the EEOC has consistently taken the opposite position and the courts have rejected Mr. Zuckerman's position. In fact, it is difficult to consider a practice which involves more age discrimination than a layoff based upon eligibility for retirement.

The policies of the fair employment laws and even the language of the statutes are so similar, the antipathy shown by Mr. Zuckerman to those protected by the Age Act has a strong bearing on his likely interpretation of the other fair employment laws which protect women and minorities. Indeed, it seems fair to conclude that Mr. Zuckerman would be loathe to enforce all other civil rights statutes whose substantive and enforcement provisions are so similar to the Age Discrimination in Employment Act.

Finally, Mr. Zuckerman's views regarding sex-based wage discrimination, as revealed in a recent meeting between Mr. Zuckerman and representatives of this organization, suggest that he may not be prepared to fully enforce Title VII regarding such claims, as required by the Supreme Court's 1981 ruling in County of Washington v. Gunther, 452 U.S. 161 (1981).

It is essential that the Committee question Mr. Zuckerman fully on the important aspects of the fair employment laws, Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act and the Rehabilitation Act, for which the General Counsel has substantial enforcement authority. The status of women will be severely hampered if these vital tools are not properly and vigorously enforced.

Thank you for your consideration of these important civil rights issues. We will be following the proceedings with great interest.

Sincerely,

Marsha Levick

Marsha Levick
Legal Director

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AMERICAN JEWISH CONGRESS

STEPHEN WISE CONGRESS HOUSE • 15 EAST 84TH STREET • NEW YORK, N.Y. 10028 • (212) 879-4500

OFFICE OF THE PRESIDENT

March 13, 1986

Honorable Orrin G. Hatch
Chair
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Re: Nomination of Jeffrey I. Zuckerman

Dear Senator Hatch:

The American Jewish Congress has long adhered to the view that religion is not a relevant factor in assessing the qualifications of those nominated to public office. For this reason, it has been critical of those who seek to secure the appointment of Christians to office merely because they are Christians, holding a particular set of religious beliefs. AJCongress believes that this same principle applies with equal force to Jews, and that no nominee should be approved because he or she is Jewish. Neither, of course, should a nominee be rejected because he or she is Jewish.

While AJCongress takes no position at this time on the nomination of Mr. Zuckerman, it is concerned with reports that some of his supporters have suggested to several senators that his Jewishness is somehow a qualification for the position of General Counsel to the Equal Employment Opportunity Commission. Such a religious test for this, or any other, position is wrong and ill-conceived. It runs counter to the most basic assumptions of the law which the Commission is charged with administering, to say nothing of the Constitution. Religion should no more be a qualification for this post than race, sex or national origin.

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The Committee should give Mr. Zuckerman, as the President's nominee, every consideration. It should consider his academic and professional qualifications, as well as his knowledge of, and commitment to, the laws the Commission is charged with enforcing. His religion, however, is not a relevant factor.

Sincerely yours,

Ted Mann

Theodore R. Mann

cc: Marc Pearl

Also sent to all members of The senate Labor and Human Resources Committee.

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LEADERSHIP COUNCIL OF LCAO AGING ORGANIZATIONS

Jacob Clayman, Chairman

March 6, 1986

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human
Resources
135 Russell Senate Office Building
Washington, D.C. 20010

Re: Nomination of Jeffrey Zuckerman to Position of General Counsel, EEOC

Dear Senator Hatch:

The Leadership Council of Aging Organizations represents thirty organizations concerned with the well-being and security of older Americans.

We write to express our opposition to the nomination of Jeffrey Zuckerman for the position of General Counsel to the Equal Employment Opportunity Commission. This nomination currently is pending before the Senate Committee on Labor and Human Resources.

We believe that Mr. Zuckerman's qualifications do not measure up to the high standards for strong and effective enforcement of laws which he would be charged with carrying out in this position. Effective enforcement of the Age Discrimination in Employment Act and other civil rights laws by the EEOC requires a General Counsel willing to use all existing legal precedents and Commission policies toward this end. However, the record before the Committee demonstrates the nominee's unwillingness to use these tools and a hostility toward aggressive enforcement of the Age Discrimination in Employment Act.

These things appear frequently in the nominee's record; in his view that companies may legally dismiss workers based on their eligibility for retirement benefits; in his view that an employer's practice which has an adverse impact on older workers should not be considered evidence of age discrimination; and in his abdication of responsibility as staff director to implement EEOC policies on apprenticeship and on pension accruals for workers beyond normal retirement age.

925 15th Street, N.W., Washington, D.C. 20005 (202) 347-8800

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The ADEA must be enforced aggressively if discrimination based on false stereotypes is ever to be eliminated. This is especially important for economically and culturally disadvantaged older people who must continue to work because they cannot afford to retire.

We ask the Committee not to recommend this nomination, based on the record before it.

Sincerely,

Jacob Clayman
Chair

JC/hc14

Attachment - List of Member Organizations

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American Association for International Aging
American Association of Homes for the Aging
American Association of Retired Persons
American Society on Aging
Asociacion Nacional Pro Personas Mayores
Association for Gerontology in Higher Education
Catholic Golden Age
Concerned Seniors for Better Government
The Gerontological Society of America
Gray Panthers
National Association of Area Agencies on Aging
National Association of Foster Grandparents Program Directors
National Association of Mature People
National Association of Meal Programs
National Association of Nutrition and Aging Services Programs
National Association of Older American Volunteer Program Directors
National Association of RSVP Directors, Inc.
National Association of Retired Federal Employees
National Association of Senior Companion Project Directors
National Association of State Units on Aging
National Caucus and Center on Black Aged, Inc.
National Council of Senior Citizens
National Council on the Aging, Inc.
National Indian Council on Aging, Inc.
National Interfaith Coalition on Aging
National Pacific/Asian Resource Center on Aging
Older Women's League
Retired Members Department/United Auto Workers
AFL-CIO Department of Occupational Safety, Health & Social Security
Villers Advocacy Associates

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December 13, 1995

The Honorable Orrin G. Hatch
Chairman
Labor and Human Resources Committee
United States Senate
Washington, D.C. 20510

Dear Orrin:

I wish to express the U. S. Chamber's enthusiastic support for the approval of Jeffrey I. Zuckerman as General Counsel of the Equal Employment Opportunity Commission.

Mr. Zuckerman's experience and professional accomplishments make him an outstanding nominee deserving of prompt confirmation. I am confident that he will provide energetic and forceful leadership in this important position and in this agency's enforcement of our civil rights laws.

Thank you.

Sincerely,

Richard L. Lesher

cc: Committee Members

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American Nurses' Association, Inc.
2420 Pershing Road, Kansas City, Missouri 64108
(816) 474-5720

Washington Office
1101 14th Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 789-1800

Eunice R. Cole, R.N.
President

Judith A. Ryan, Ph.D., R.N.
Executive Director

April 8, 1986

The Honorable Orrin G. Hatch
U. S. Senate
Senate Committee on
Labor & Human Resources
135 Russell Building
Washington, DC 20510

Dear Senator Hatch:

On behalf of the 188,000 members of the American Nurses' Association (ANA), I am writing to express our opposition to the nomination of Jeffery I. Zuckerman as General Counsel of the Equal Employment Opportunity Commission (EEOC).

ANA supports the right of the President to nominate for Executive branch positions individuals who hold positions consistent with his political philosophy. However, we have grave concerns as to Mr. Zuckerman's commitment to strong, active enforcement of existing Federal anti-discrimination laws.

Mr. Zuckerman joined the staff of the EEOC in August of 1984, without prior experience in civil rights. In his tenure as Chief of Staff, he seems to have left behind the principles of the fair employment laws as interpreted by Congress, the courts, and the EEOC under both Republican and Democratic administrations.

Mr. Zuckerman's suggestions that minorities and women can overcome discrimination by offering to work for lower wages than white and male employees is extremely troubling. This view is contrary to the spirit of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Despite Mr. Zuckerman's claim of support for the Equal Pay Act, we are deeply worried that his proposals are in clear contrast to that law.

Mr. Zuckerman's disregard for the Age Discrimination Act is also troubling. His view that an employer may lay off employees on the basis of their eligibility for retirement, if the employee's intent was benign, and not violate the Age Act, is in direct opposition to the position of both the EEOC and the courts. His position also demonstrated a callous disregard for the valued well-being of older Americans. Further, the imposition of his personal interpretation of the Act by Mr. Zuckerman, in contrast to established EEOC policy and case law, is not proper. It does not bode well for the future enforcement of fair employment law.

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For the past twenty years, our society has made great advances towards the elimination of discrimination, and EEOC has been an important force in that change. We are concerned that the confirmation of Mr. Zuckerman as General Counsel of the EEOC would not be consistent with that heritage.

Sincerely,

Eunice R. Cole

Eunice R. Cole, R.N.
President

ERC/JBP:paj

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Nathan Perlmutter
National Director

823 United Nations Plaza
New York, N.Y. 10017
(212) 490-2525

April 4, 1986

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

We have recently learned that allegations have been made that members of Congress have been urged to support the nomination of Jeffrey I. Zuckerman as general counsel of the Equal Employment Opportunity Commission simply because Mr. Zuckerman is Jewish.

Our concern over these allegations led us to investigate the charges. We have been unable to find any evidence whatsoever to substantiate the claim that Mr. Zuckerman's religion has been used to garner support for his confirmation. Certainly we are not aware of any organizational efforts supportive of Mr. Zuckerman on the grounds of his faith.

To be sure, the notion that an individual's religion is in any way relevant to his or her ability to hold public office should be rejected. Mr. Zuckerman's religion, however, is not the real issue. The real issue for some who are raising these spurious allegations may well be Zuckerman's principled opposition to racial quotas and goals.

One is sadly reminded of the confirmation hearings of Morris Abram, John Bunzel and Robert Destro for the U.S. Commission on Civil Rights. Some who disagreed with the position of these distinguished Americans on quotas challenged the President's authority to make the nominations and, in some cases, accused the nominees of being "racists." Opponents of Mr. Zuckerman's confirmation have similarly attempted to throw a smokescreen over their primary objection: Mr. Zuckerman's forthright opposition to discriminatory quotas and goals.

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Mr. Zuckerman's academic and professional qualifications make him eminently qualified for the position of EEOC general counsel. His opposition to quotas and goals reflects his understanding of, and commitment to, the language and spirit of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. Mr. Zuckerman is committed to their enforcement, which is central to eradicating the vestiges of discrimination.

Sincerely,

Nathan Perlmutter
National Director

NP:bw

The CHAIRMAN. So, at this point, Senator Kennedy, we turn to you.

Senator KENNEDY. Thank you very much, Mr. Chairman.

Good morning, Mr. Zuckerman.

I want to pick up where we left off last time. I think we agreed that one of the things that the title VII prohibits is the——

The CHAIRMAN. Ted, before you ask questions, I was just turning for statements, and then thought I would ask maybe one or two before we—do you have any statement?

Senator METZENBAUM. I have no statement. But at this time I would like to put in the record an editorial from the Orlando Sentinel concerning——

The CHAIRMAN. Without objection, we will place that in the record.

[The editorial referred to follows:]

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The Orlando Sentinel

FOUNDED 1876

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Third time is not a charm

This month Jeffrey I. Zuckerman will make yet another appearance before senators who are considering his nomination to be the Equal Employment Opportunity Commission's top lawyer. During two previous hearings Mr. Zuckerman was hardly persuasive.

Indeed, Mr. Zuckerman's skepticism of laws and policies that forbid discrimination in the workplace is sufficient reason for the Senate Labor and Human Resources Committee to reject his nomination. After all, the chief counsel's job is to decide which cases to prosecute under those very laws and policies.

Civil-rights groups are lobbying heavily against Mr. Zuckerman's nomination, primarily because of his opposition to affirmative action. Surprisingly, they have an ally in the 22 million-strong American Association of Retired Persons. Never in its 25-year history has the organization opposed a presidential appointee.

It's understandable why AARP, which has 1.5 million Florida members, is angry at the nomination. Just look at how Mr. Zuckerman interprets the federal Age Discrimination in Employment Act of 1975.

For example, although three federal courts have ruled that employers cannot lay off or dismiss workers solely on the basis of their eligibility for retirement benefits, Mr. Zuckerman has insisted otherwise. And the 35-year-old former Justice Department attorney, who has served as chief assistant to EEOC Chairman Clarence Thomas, has ignored a policy change that prohibited the exclusion of older workers and women from union apprenticeship programs

Florida's Sen. Paula Hawkins, a Labor and Human Resources Committee member, blamed the delay in implementing the new policy on Mr. Zuckerman. She accused him of being "childish." Mrs. Hawkins should vote against his nomination.

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The CHAIRMAN. Let me just ask three questions, Mr. Zuckerman, and then I will turn to Senator Kennedy.

STATEMENT OF JEFFREY IRA ZUCKERMAN, NOMINATED TO BE GENERAL COUNSEL OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The CHAIRMAN. Based on your understanding of the law, what must a complainant demonstrate to establish a prima facie case under the Equal Pay Act?

Mr. ZUCKERMAN. The plaintiff has to show that a person of the opposite sex doing the same work as the plaintiff is being paid more than the plaintiff for doing the same work.

The CHAIRMAN. OK.

Documents No. 20 and 43 which you wrote, Mr. Zuckerman, discuss a detailed analysis of the process for determining whether two jobs are essentially equal.

This process would not rely on the testimony of job evaluation experts, but instead would focus on other evidence such as whether the plaintiff applied for a higher paying position.

If confirmed as general counsel, do you intend to utilize this process as a basis for recommending or not recommending litigation of an Equal Pay Act complaint?

Mr. ZUCKERMAN. No. And if I may, I would like to explain what those documents were.

A problem that often arises in Equal Pay Act litigation is the question of how does one determine if two jobs that are not exactly equal are nonetheless sufficiently substantially equal that a difference in payment between men and women would constitute a violation of the Equal Pay Act. And this inquiry can degenerate into a battle of experts over various subjective considerations they consider relevant to decide whether it seems that the jobs are equal or whether it seems that they are not.

I was trying to figure out whether there is some better way to do it, an approach that would be a more effective way to try to achieve efficient enforcement of the Equal Pay Act. One of the beauties of the Equal Pay Act is its efficiency and the simplicity with which to make a case, and these battles of experts reduce the act's effectiveness by making cases more complex. So, therefore, I was thinking about how to approach job comparisons without relying on experts. One thought I had was that if two jobs are the same or substantially the same, and one pays more than the other, it would be reasonable to expect that a person would apply for or seek to get the higher paying one.

I also thought about a fact that had been noticed by many others: The close connection between where one finds sex based wage discrimination, and where one finds sex based segregation in jobs. For example, in the 1980 EEOC hearings on wage discrimination, I think it was Winn Newman who mentioned this.

So, I was trying to think through whether there was something that could be done with this facially plausible expectation, and the fact that wage discrimination and job segregation seem to go hand-in-hand. I was talking with one of the Commissioners, Commissioner Alvarez, just talking it through, and had some ideas which he

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then seemed interested in. We talked about these ideas, and Commissioner Alvarez said that he might discuss these ideas with some of the other Commissioners at the next Commission meeting. I mentioned this to the Chairman, and tried to very quickly put down in writing for the Chairman the ideas I have discussed with Commissioner Alvarez. That is the earlier of those two memos. And I remember stamping it "Draft" as many times as I could to try to indicate to anyone who might ever see the memo, though the only one I gave it to was the Chairman, that this was a very tentative thinking.

This approach was never discussed at a Commission meeting as best as I can recall. I think I talked about it with a couple of the staff people who have been most involved with sex-based wage discrimination, and then I put it aside.

The second document came up as the Commission was preparing to issue a decision on comparable worth, that is, whether claims of unequal pay for comparable work are cognizable under title VII. I talked with the Chairman, and he was kind of hoping to see if there could be some sort of comprehensive statement concerning sex-based wage discrimination.

And so, under very unusual conditions, I drafted that second document: I plopped down on the paper this analysis, spreading it out more than in the first memo. And by the time I was finished spreading the analysis out in the second document, it seemed to me clear that it did not work. It ends up that there are burdens placed upon the plaintiff that do not belong on the plaintiff under the statute. And benefits of the doubt are given to defendants where, instead of benefits of the doubt, they are supposed to have burdens of proof. I think there is a whole host of problems in the approach as plopped down there that just make it not work.

In terms of using that approach if I were general counsel, I have already said I would not. The one observation I would add is that the committee has reviewed all of the memos I have written to the Chairman, analyzing proposed Equal Pay Act litigation. The committee requested copies of many—I am not sure, maybe even all—of those and in none of them did I ever suggest using this approach to actually analyze a particular proposed EPA complaint.

The CHAIRMAN. Just one last question.

In a letter I received from the American Association of Retired Persons, the association implies that you have used your current position as Chief of Staff to delay the issuance of new regulations in the areas of pension benefit accrual and apprenticeship programs under the ADEA.

The association states,

> Mr. Zuckerman assumed responsibility for the issuance of the new regulations and has provided no satisfactory explanation for his failure to move these regulations forward through OMB.

Is that an accurate description of what happened? Now, before you answer, let us understand that you are still under your affirmation that you took last time. You accept that, is that correct?

Mr. ZUCKERMAN. Yes, sir.

The CHAIRMAN. OK.

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Then if you would, do you think that is an accurate description of what happened?

Mr. ZUCKERMAN. No, sir. It is not and has not been at any time my, in their words, "responsibility for the preparation of these regulations." This was a responsibility of one of the offices of the Commission, the Office of Legal Counsel. The present Acting Director of that office does not report to me, and does not report through me. She reports directly to the chairman. It was not assigned to me as a special assignment by the Chairman, or anything else. This simply was not my assignment.

To the extent I ever had any conversations with the acting legal counsel, I urged her to see to it that this regulatory impact analysis be done as quickly as possible, and that this proposed regulation be sent out of the Commission, to OMB, just as quickly as this possibly could be done.

The one thing I was responsible for with respect to the pension benefit accrual regulations related to Executive Order 12498, under which the heads of executive branch agencies are required to submit regulatory programs to the Office of Management and Budget for inclusion in the President's regulatory program.

The Chairman asked me to take care of the initial drafting of the overview of his program, which I did. The committee has all the materials that were submitted by the Chairman to OMB. And in each of those we included—the Chairman included the pension benefit accrual change in regulations. I was responsible for drafting that portion of the overview. I did it, and I think I did it—well, I think I will let what I did stand for itself.

The CHAIRMAN. All right.

Well, thank you so much.

Let us turn to Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman, again. Good morning, Mr. Zuckerman.

We agreed at our last hearing that one of the things that title VII prohibits is the use by an employer of employer selection criteria that have a disparate impact against minorities, and that this prohibition is a separate cause of action from a disparate treatment case. In a disparate impact case, there is no need to show that a defendant employer intended to discriminate against minorities. It is enough that a test has that effect. And we agree that the only way to prove a disparate impact case was with statistical proof.

We agreed that statistical proof was necessary and sufficient to make a showing of disparate impact. Now, do you favor requiring anything more than statistical evidence to make out a case of disparate impact?

Mr. ZUCKERMAN. No. By definition, statistical evidence can make out a prima facie case of disparate impact.

Senator KENNEDY. You know, the Commission, in reviewing the USGP, and we talked about Chairman Thomas' submission to OMB last time which you helped write. And that document says "The EEOC has turned the statute on their heads by using rigid statistical rules to define discrimination without regard to the plain meaning of the term."

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Now, Mr. Zuckerman, limiting your answer to the disparate impact cases, what statistical rules have turned the statute on their heads?

Mr. ZUCKERMAN. For example, I think it was Senator Simon at the last hearing who referred to a hypothetical company that he and Senator Metzenbaum might form to produce cigars for you.

Let us say that company has 100——

Senator KENNEDY. It is awfully nice of them to do that in my absence.

Senator METZENBAUM. Not to be smoked in this committee.

Mr. ZUCKERMAN. Let us say that company has 100 white applicants for jobs, and they hire 40. And they have 100 black applicants for jobs, and hire 30.

Under the 80-percent rule, this establishes a prima facie case of discrimination in violation of title VII of the Civil Rights Act.

I do not think Congress ever intended to establish that. The courts have never said that that sort of approach is what they had in mind. The Supreme Court has never endorsed that sort of rigid mechanical approach. That is what I am concerned about, where we get into a rigid, mechanical, statistical definition of discrimination that moves away from the question of is there discrimination? Is there consideration of race underlying the employment decision-making? That is what I have in mind.

Senator KENNEDY. Well, what more do you want, what more do you want beside the statistics?

Mr. ZUCKERMAN. I do not see how in the situation I just described, from those statistics alone, one concludes that there is a violation of title VII.

Senator KENNEDY. Well, why not?

You have 100 and you take 40. You get no apparent requirement or test. We are not talking about a test, where you have a space shuttle and you need a test for—I mean you have a requirement that you have engineers.

We are talking about, as I understand it, making cigars the simple kind of a requirement. And we have 100 applicants which are white and 100 which are black. You have the statistics 40 to 30.

What beyond the statistics do you believe ought to be included in any kind of a requirement beyond just the statistics?

Mr. ZUCKERMAN. I guess I am not sure that making cigars is such an unskilled kind of thing.

Senator KENNEDY. Well, you know what I am driving at. I mean we can take a couple more hours to dance around these questions, you know, like taking a ditchdigger. Let us use my example then instead of—let us just take a ditchdigger. Let us just take a ditchdigger.

Mr. ZUCKERMAN. We started off talking in terms of employee selection that is not based upon a test. The Supreme Court has only said this disparate impact approach will apply in the use of tests or other types of specific objective criteria. Lower courts, several circuits, have said that once you go beyond that, you cannot even have this kind of automatic prima facie test under disparate impact theory.

I would say that the bottom line becomes, let us say with ditchdiggers, we look at when they are hired, and is there any evidence

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of discrimination? Say the company had an opening on April 9. We find the people who applied. We determine how the company went about giving out notice of the opening, the things they did. We find out who showed up and who was selected.

Do we see anywhere in that process—whether the person selected was white, black, Asian-American, Hispanic, whoever the person selected was—do we see any evidence that the person's race, sex, national origin was considered in the selection process?

I do not see how looking at a year's worth of hiring, and you have 40 out of 100 whites were hired as ditchdiggers and 30 out of 100 blacks were hired as ditchdiggers, how do you go from that kind of—call it a disparity if you want—but that kind of pattern, and then conclude from that that the company is discriminating on the basis of race.

Senator KENNEDY. What if it is 45 and 25?

Mr. ZUCKERMAN. That is where we come to what is——

Senator KENNEDY. It is significant.

Mr. ZUCKERMAN. Precisely.

Senator KENNEDY. That has been defined in the court decisions.

Mr. ZUCKERMAN. But you see, once you are talking about what is significant—from what is it that we can make a reasonable inference?—that is exactly the question I have been trying to find some help on, some guidance on. What is the reasonable point? And the rigid 80-percent rule does not seem to do it.

Senator KENNEDY. Well, you have the two different—obviously the two different tests, one with the disparate impact, one the disparate treatment. One you have to show intent, the other you do not. And we have had, over a long period of the history of this particular provision, where that, rather than looking for inference or trying to find some rule of reasonableness, it has been decided on statistics. You might not like it, you may not want it, you may not approve of it, but that is currently the way it has been decided. And we want to find out whether you are going to continue to decide it that way, or whether you are going to look for a way of getting around it.

Mr. ZUCKERMAN. Senator, if confirmed, I intend to use statistics. I have never even suggested not to use statistics. I do not think I have suggested here not to use statistics.

The courts have not applied this kind of rigid 80-percent rule. The Supreme Court has not, the courts of appeals have not. I do not think the district courts have. This is not their rule.

And what I am suggesting, Senator, is that this rule does not make sense under any and all circumstances. And if it does not, then it should not be applied in those circumstances where it does not make sense.

And we should be thinking about what better way——

Senator KENNEDY. Well, what percent of the cases do you think it does not make sense—those exceptional cases, 3, 4, 5 percent?

Mr. ZUCKERMAN. I do not know.

Senator KENNEDY. You do not know? You do not have from your own experience and reviewing these kinds of cases, you do not have at least some rough idea about what percent?

Mr. ZUCKERMAN. Because the courts are not using this rule, Senator. Therefore, I cannot look at the court decisions and say that a

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court used it here, and it does not make sense here. The courts are not using it.

The courts are saying let us get into real statistics, let us talk about whether there is any kind of significance to a particular disparity. In the situation that I just gave you, it technically meets the 80-percent rule; but I do not think there is any court that would say—even if we were talking about a testing situation—from that alone, there is a violation of title VII.

Senator KENNEDY. Well, what is your understanding is of the *Griggs* decision then as it referred to the particular statistics?

The *Griggs* case, as I understand it, the plaintiff made clear that the plaintiffs proved the prima facie disparate impact case, no proof of intent to discriminate need be shown. It is enough that the test disqualifies more blacks than whites.

Now, is that your understanding of the *Griggs* decision?

Mr. ZUCKERMAN. Just that the test disqualifies more blacks than whites? I do not think that is an adequate statement of disparate impact. I think there has to be—and I cannot remember if it was in *Griggs* or in *Albemarle*, that the Supreme Court talked in these terms—a substantially disparate impact.

We are getting into what is substantial. The key question is, Senator, from what statistics can we say this is discrimination? It comes up in the disparate impact area, and it comes up in the disparate treatment area. It came up in the *Sears* case, which was disparate treatment——

Senator KENNEDY. Those are treatment. I am just asking about impact. Let us just leave treatment alone.

Well, there is a very clear differentiation. I mean as much as might, you know, want to try and blur it, I am only interested in the impact cases.

Mr. ZUCKERMAN. Oftentimes we will try to go on both. Like in the *Sears* case we tried——

Senator KENNEDY. I am not interested for those particulars. I am talking about impact.

If you want to make a general statement about your own view about this whole problem, that is fine. But a response to my question just on the impact.

What is your understanding of what is necessary from the holding of *Griggs* beyond the statistical information?

Mr. ZUCKERMAN. Well, I would say from—beyond statistical?

Senator KENNEDY. That is right.

Mr. ZUCKERMAN. A statistical showing is adequate to establish a prima facie case of discrimination under the disparate impact theory, at least in situations where you are talking about objective criteria, such as a test or a height and weight requirement.

The question is what statistics are sufficient. I do not think *Griggs* decides that. I do not think *Albemarle* decides that. I do not think *Teal* decides that. The courts have not used the 80-percent test.

Senator KENNEDY. Well, what are you talking about? What statistics are you talking about?

You said that the statistics turned it on its head. You are not talking, as I understand—maybe we are talking about the same thing, I do not believe we are, about adjustments and new develop-

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ment and understanding statistics through additional kinds of information that has been developed in recent times, where you can find consideration of different groups. You get more information that helps to reach this particular question about whether the disparate impact has resulted in a significant difference in statistics. I mean that is one thing. That is one thing.

But that is not what you have been emphasizing here. You have been talking about how this test has stood the law on its head. And I want to know what is it about the statistics that you are troubled by? What other statistics do we need?

Mr. ZUCKERMAN. Senator, when we set up a test that says that any selection process that ends up with 40 out of 100 whites hired, and 30 out of 100 blacks hired—that any selection process that ends with those results is discrimination, that to me is standing title VII on its head. That selection process does not necessarily reflect discrimination.

It may be discrimination is going on. It may not be discrimination is going on. And the courts, in establishing the disparate impact theory, have not said that that is discrimination. That is the point, Senator.

Senator KENNEDY. Well, if it is 42 to 28, when do you draw the line? Forty-two to twenty-eight, is it or is it not?

Mr. ZUCKERMAN. I do not know, Senator. I guess I would want to look——

Senator KENNEDY. Well, that is why we established statistics because we do not want to leave that up to just every Tom, Dick, and Harry that comes in to enforce the law.

Mr. ZUCKERMAN. It is not up to a Tom, Dick, or Harry who enforces the law.

The point is in these cases—and the courts have recognized this particularly in discrimination cases—we have to look at all the facts of the case. There is no rigid line, whether it is 80 percent or 79 percent or 81 percent. There may not be any rigid line that is going to work in every case, which is why the courts have not gone that route.

Senator KENNEDY. All right

Let us take 90 to 10. Does that satisfy you, 90 to 10?

Mr. ZUCKERMAN. Depending on the facts, it very well might. There are 90 out of 100 whites——

Senator KENNEDY. Yes.

Mr. ZUCKERMAN [continuing]. And 10 out of 100 blacks.

Senator KENNEDY. That is right.

Mr. ZUCKERMAN. And we are talking about an exam?

Senator KENNEDY. Ditchdigger, ditchdigger.

Mr. ZUCKERMAN. Well, that is where it is not an exam.

Senator KENNEDY. No. You have got an exam. You have got an exam for a high school diploma. You have to have a requirement for a high school diploma.

Mr. ZUCKERMAN. And that is the basis on which people are hired?

Senator KENNEDY. Yes.

Mr. ZUCKERMAN. I would say under that situation, then the burden shifts to the employer to come in and establish the job-re-

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latedness of a high school diploma. And I would doubt that the employer could do that. They might, but I do not see it, sitting here.

Senator KENNEDY. That is not enough to satisfy you?

Mr. ZUCKERMAN. No; I am saying it is enough.

Senator KENNEDY. Eighty to twenty, eighty to twenty.

Mr. ZUCKERMAN. That is where the burden shifts.

Senator KENNEDY. Eighty to twenty.

Mr. ZUCKERMAN. With the high school diploma——

Senator KENNEDY. That is right.

Mr. ZUCKERMAN [continuing]. For the ditchdigger?

Senator KENNEDY. That is right.

Mr. ZUCKERMAN. That is substantially disparate on an objective basis.

Senator KENNEDY. Seventy to thirty.

Mr. ZUCKERMAN. I understand the point of your question, Senator. And I do not know where the line is; 70 to 30 may very well be substantially disparate. I do not know. On a sample that size, I do not know what the significance of a discrepancy like that is.

Senator KENNEDY. Well, I think we have reached what your general kind of statistical requirements are.

It is somewhere around 70 to 30.

Mr. ZUCKERMAN. No, sir. I say what we have to look at is whether there is some significance to the statistics. When you have 90 to 10, I am assuming, from my general familiarity with statistics, when you are at that level, you are talking about a disparity even with that size sample that has some statistical significance.

I do not know if 70 to 30 has statistical significance. As opposed to 700 to 300, let us say, out of 1,000 applicants. I am pretty sure that 700 to 300 with 1,000 of each, you do have some significance to that statistical disparity. But if we only have 100 of each and it is 70 to 30, I do not know sitting here whether that is a significant statistical disparity.

Senator KENNEDY. The troublesome thing, Mr. Zuckerman, it is going to be up to you whether these cases are going to be brought. You are going to have a profound input whether these cases are going to be brought, whether they are ever going to have a chance to consider whether those are significant or not.

If you are not troubled or bothered by these matters or think that at 70 to 30, you would like to get additional kind of information, then there are going to be an awful lot of cases that will not be brought. That is what I gather from you. I mean this is what we are driving at.

And you will have an opportunity to respond. And that, I do not think, is satisfactory and I do not think that has been the fair interpretation of where this particular requirement, or these particular regulations have been over the period of the past. You have a different view about that. You have a different view about it.

But having that view about 70 to 30 and not being sufficiently concerned about that, so at least the courts are going to make a judgment, I find very troublesome.

Mr. ZUCKERMAN. The way the courts have gone, and the way I would go because, I think, it is the right way to go, is to ask whether there is some significance to the statistical disparity. The notion

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of significance is a concept within statistics. Can we infer anything from the disparity in statistics?

Sitting here, I cannot give you a judgment on that, on 70–30. I cannot tell you whether it is 65 to 35, 60 to 40. I do not know sitting here. But that is the way to go: to ask whether there is some significance to the disparity. The concept of significance is a term within statistics. It is understood within statistics. It is the way the courts have gone; it is the way, I think, that the EEOC ought to go; and it is the way I can assure you that I would go if I were general counsel.

Is there significance to the disparity in statistics? If not, then we cannot infer anything from the statistics alone. This does not mean that that is the end of inquiry, either. A company's statistics may be wonderful, they may be perfect—the hiring rates for different groups may be identical—but there may still be discrimination going on. And there is no defense to that discrimination even if the hiring rates are identical.

Statistics are not the end of the examination.

The CHAIRMAN. You are saying statistics standing alone is not the end of the examination?

Mr. ZUCKERMAN. It was the Supreme Court in *Teamsters* that talked about how statistics come in infinite varieties, and they simply have to be looked at as to what can we figure out from the statistics that there are.

The CHAIRMAN. But standing alone, they do not make a case for or against discrimination?

Mr. ZUCKERMAN. Under some circumstances, perhaps in this disparate impact area, there are circumstances in which statistics alone will make a prima facie case.

The CHAIRMAN. Sure.

Mr. ZUCKERMAN. Which means the burden goes to the employer to show that he did not discriminate on the basis of race.

The CHAIRMAN. Thank you.

Senator Kerry, can we turn to you at this time?

Do you know how much time you are going to take, Senator Kerry and Senator Dodd?

Senator KERRY. I do not know. Not that much time.

The CHAIRMAN. I promised Senator Metzenbaum when he comes back that I would turn to him. He had to go to the floor temporarily.

Senator KERRY. I would be glad—is he returning in a moment?

The CHAIRMAN. He will be in a few minutes.

Senator KERRY. That is fine.

I do not know how long my questions will take.

The CHAIRMAN. Why do we not go as far as we can.

Senator KERRY. Mr. Zuckerman, obviously, and I am sure you would not disagree with the fundamental notion that the EEOC is charged with the responsibility of enforcing the Discrimination Employment Act? That is prima facie, is it not?

Mr. ZUCKERMAN. Certainly we are charged with enforcing it, and it would be a privilege and——

Senator KERRY. Can you pull the mike up a little bit. I cannot hear that well.

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Mr. ZUCKERMAN. We are charged with enforcing it, and it would be a privilege for me to be general counsel of the agency enforcing that.

Senator KERRY. And the Commission in past enforcement of that, and in its obligations to enforce it, has adopted official regulations with respect to enforcement policies, correct?

Mr. ZUCKERMAN. Yes, sir.

Senator KERRY. And those regulations express the avowed policy of the Commission in its pursuit of the stated congressional intent of that act?

Mr. ZUCKERMAN. Yes.

Senator KERRY. Now, one of those regulations, 29 CFR 1625.7(d), addresses the issue of disparate impact under the ADEA, correct?

Mr. ZUCKERMAN. I do not have it in front of me, but I think that——

Senator KERRY. I can give you a copy of it.

Mr. ZUCKERMAN. There is a regulation that addresses it.

Senator KERRY. There is a regulation, and you will accept my statement that it is that particular one?

Mr. ZUCKERMAN. Absolutely.

Senator KERRY. And that regulation makes it clear, does it not, that disparate impact approach adopted under title VII also is application to the ADEA?

Mr. ZUCKERMAN. That was the position taken by the Commission, yes.

Senator KERRY. That is the Commission's position, is it not?

Mr. ZUCKERMAN. That was the position taken by the Commission when that regulation was adopted. I think there are a number of Commissioners in the current Commission who have expressed concern about that, regulation, who disagree with it.

Senator KERRY. But it is the position of the Commission. Whether or not a couple of Commissioners had a disagreement with it is not the question. The question is, is it the position of the Commission?

Mr. ZUCKERMAN. It is the stated position of the Commission.

Senator KERRY. Was there a distinction between the stated position of the Commission and the real position?

Mr. ZUCKERMAN. The Commissioners at this time are thinking through this issue. I do not know what their view would be on this issue. And so what is the Commission's position? The regulation says what it says, and that is the stated position of the Commission.

Senator KERRY. So, for the average citizen and for someone who is concerned about how this law is going to be applied, who reads the Commission's position, who understands the Commission's position, who proceeds along a belief that the Commission holds a certain position, that position is that the regulation says the disparate impact approach is applicable to the ADEA, correct?

Mr. ZUCKERMAN. Yes, sir.

Senator KERRY. That is the position?

Mr. ZUCKERMAN. Yes, sir.

Senator KERRY. And that is the position that, in fact, has been upheld in challenges, is it not?

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Mr. ZUCKERMAN. Several courts have held, have applied the adverse impact approach in ADEA cases. Some courts have questioned it.

Senator KERRY. Now, I understand from your testimony at the last hearing, or prior even to your last—this is now your third—that you personally question the legality of the official EEOC position Is that correct?

Mr. ZUCKERMAN. I question its correctness as a matter of law

Senator KERRY. All right.

Now, is it fair then for me to understand in this confirmation process that in some instances, perhaps most or even all instances, where a disparate impact could be shown to exist under the ADEA, you would recommend as counsel against requiring the employer to demonstrate a business necessity, even though the Commission regulation calls for that demonstration?

Mr. ZUCKERMAN. I would recommend——

Senator KERRY. Can I ask you why you paused so long to consider that? Is it complex?

Mr. ZUCKERMAN. I did not realize I had paused so long.

Senator KERRY. Well, I wonder why you do not say, no, I would go ahead right away and enforce it, or I would not.

Mr. ZUCKERMAN. I do not——

Senator KERRY. Is it not clear?

Mr. ZUCKERMAN. I do not enforce it. I would not be enforcing it myself.

Senator KERRY. Making a recommendation.

Mr. ZUCKERMAN. In making a recommendation to the Commission, I would set out for the Commission the law and the regulation. It would then be up to the Commissioners to address the question of what is the Commission's position.

If the Commission disagrees with the existing regulation, then the Commission should change that regulation. It is an interpretive regulation, it is a statement by the Commission of its interpretation. I would say to the Commission here is your regulation, here is the legislative history, here is what the courts have said, here is what the statutes say. If the Commission agrees that that interpretation in that regulation is correct, then enforcement should be in accordance with that regulation. If the Commission disagrees with that regulation to any extent, then it is the obligation of the Commission, as I see it, to change the regulation to state what its interpretation of the act is, and to enforce the act in accordance with its interpretation.

Senator KERRY. Now, are you going to put all of your recommendations into that kind of ambiguity?

Mr. ZUCKERMAN. No; I would put this issue before the Commission for the Commission to decide. And if the Commission decides it agrees with the interpretation as is, then all subsequent recommendations will be in accordance with the Commission's decision that that is their interpretation of the statute.

If they decide to change the interpretation, I would then recommend in accordance with the Commission's interpretation of the statute.

Senator KERRY. Well, if that is all you are going to do, why do we need a counsel to make any interpretations at all?

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I mean they can decide that for themselves. That is not really a recommendation, is it?

Mr. ZUCKERMAN. Why is that not—I guess I do not understand.

Senator KERRY. Well, it is kind of saying—I mean, if you are going to say to them if you like this, go ahead and enforce it, and if you do not like it, do not enforce it.

Mr. ZUCKERMAN. It is not a question of like or not like. It is a question of what is the correct interpretation of the law.

Senator KERRY. What are you going to recommend to them is the correct interpretation of the law?

Mr. ZUCKERMAN. The comprehensive statement I prepared for Senator Dodd lays out my analysis. I question whether under the Age Discrimination Employment Act, the theory of disparate impact can be applied, should be applied, was intended to be applied to the extent that it is applied under title VII.

Professor Blumrosen in many ways is the one who conceived the disparate impact theory for title VII purposes. He came to the conclusion that it has no role in Age Discrimination in Employment Act litigation, based on an exhaustive survey of the legislative history of, and the congressional intent underlying, the Age Discrimination in Employment Act.

I do not go that far to say that disparate impact has no role whatsoever. I agree with the courts that have said this is a very difficult, question, and that these age discrimination cases have to be looked at on their particular facts and in their particular contexts. In some cases, disparate impact will establish a violation, and in other cases it may not.

I would recommend to the Commission that it interpret—that it formally interpret the statute in that sort of fashion.

Senator KERRY. Well, let me sort of get at "that sort of fashion."

Have you fashioned what you think is an appropriate definition of impact? I mean if it is not disparate, what kind of impact should it be from your interpretation of the regulation?

Mr. ZUCKERMAN. I do not understand the question.

Senator KERRY. Well, the regulation says specifically when an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a factor other than age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.

Now, adverse has been interpreted to include under title VII the notion of disparate impact; when it has a disparate impact, when it has an impact, an impact. The issue here is whether it has an impact on someone's life.

How would you define the impact on someone's life?

Mr. ZUCKERMAN. Adverse impact and disparate impact are synonomous.

Senator KERRY. Fine. I am glad to hear it.

Then the regulation is even more clear than I thought it was.

Mr. ZUCKERMAN. This is really what I was just discussing when Senator Kennedy was asking me about disparate impact under title VII. If there is a selection process where we simply find that the rate at which people within the protected age group are hired is different from the rate at which people not in the protected age

group are hired, does that in and of itself establish a violation of the Age Discrimination in Employment Act, regardless of whether the employer actually took their ages into consideration?

If the employer takes age into consideration, and decides not to hire the 50-year-old, that has an adverse impact on that 50-year-old. And that is a violation of the statute. Is it a violation for the employer to take the age into consideration? Yes, that is a violation right there, without getting into statistics or anything else. Without regard to whether that regulation is a correct interpretation of the statute or not; without regard to whether Professor Blumrosen is right or not; whether the courts are right or not, that is a violation on its face, period.

Senator KERRY. Well, let us come back to my original question then.

Why is there then any hesitancy in whether or not you would recommend that disparate impact should be the standard?

Mr. ZUCKERMAN. Because what disparate impact has come to mean—it is a term of art—in title VII litigation is that, under certain circumstances, simply a different rate of hiring, in and of itself, establishes a violation of title VII.

The question is, under what circumstances does that establish a violation of the Age Discrimination in Employment Act?

And again, supposing there are 100 applicants between the ages of 30 and 40, and 100 applicants between the ages of 40 and 50. If 40 of the people between 30 and 40 are hired, and 30 of the people between 40 and 50 are hired, does that in and of itself mean that this employer is violating the Age Discrimination in Employment Act?

Senator KERRY. Of course, it does not, because he has an opportunity to show that it was a business necessity.

Mr. ZUCKERMAN. But does it in and of itself establish a prima facie violation of the Age Discrimination in Employment Act, simply on the basis of that evidence alone? Under the regulation, read together with the title VII regulations to which it refers, that would in and of itself establish a violation of the Age Discrimination in Employment Act.

As I read the legislative history, as I read the plain language of the statute, that does not in and of itself establish a prima facie violation of the act. If the Commission thinks that it does, then it should leave the regulation as it is and enforce the act in accordance with the regulation.

I agree with the point that you were making at the beginning: the Commission should enforce the law in accordance with its public statements of what the law means. I would suggest to the Commission that in this sense the regulation goes beyond what the law says, what the Congress said, what any courts have said, indeed is contrary to what the law says and to what the Congress said, and in that sense the regulation should be changed.

Senator KERRY. So you will in effect recommend the position to the Commission that is contrary to what the courts have in fact held. And does it not matter to you that not one court has agreed with Professor Blumrosen? Not one court has agreed with him.

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Mr. ZUCKERMAN. The courts have not held, whether under title VII or the Age Act, that this automatic mechanical approach is valid. I mean that is No. 1. No court has gone to that extent.

With respect to the courts that have held that disparate impact is applicable, I pointed out in my written submission to Senator Dodd, that the courts, in reaching their conclusions in those cases, did not consider the legislative history of the Age Discrimination in Employment Act, and did not even consider the language of the statute itself. Section 4(f)(1) of the statute itself makes "a reasonable factor other than age" a permissible basis for a differential. But the Leftwich court, the Markaham court, in the second circuit, these courts never even looked at what are the implications of 4(f)(1). What they said is we have this rule under title VII, the Age Act is in para materia with title VII, and therefore the rule applies under the Age Act. They ignored the fact that this 4(f)(1) provision, the "reasonable factor other than age" provision, has no parallel in title VII.

So we have to ask ourselves what is the meaning of section 4(f)(1) of the Age Act. Those courts interpreted the statue without regard to 4(f)(1), as if that provision did not exist.

Senator KERRY. But you know, as all of us know who are lawyers, you can find any phrase in any case to hang a hat on and to make an argument. That is not really the issue here. The issue here is whether as counsel, you are going to recommend or not recommend the pursuit by the Commission of its own policy and whether or not you are going to seek to try to find that legal handle on which to hang your hat so that you can recommend some alternative route.

If the stated position of the Commission is x, and you are going to try and promote y as the approach, then there is a question of whether or not you are trying personally to fulfill the intent of the Commission or whether you are trying to change the intent of the Commission.

Mr. ZUCKERMAN. First let us get clear the extent of this. I do not recall having seen yet at the Commission a case where the staff was urging an adverse impact approach under the Age Act where a disparate treatment approach could not have been applied—where on the evidence, it was not clear that age had been considered by the employer, where there was not clear age discrimination.

In the age cases, we see time after time that employers are simply taking age into consideration in not hiring, in deciding whom to lay off, in deciding whom to promote. One of the points I have made within the Commission is that we are not doing enough in terms of going after the basic age discrimination—the discrimination that Congress addressed in the act, the discrimination that Congress intended to prohibit in the act.

One of the things I have been urging is that the staff ought to be doing more about digging into the age discrimination cases and digging into the investigations and bringing more of those cases of hardcore discrimination.

As for adverse impact, I have stated my views here, and I have stated them in writing in response to Senator Dodd's request. If I were general counsel and making a recommendation to the Commission, I would state my understanding of the statute, laying out

what the courts have said, what Congress said, and what the plain language of the statute says. It is not a matter of taking some phrase from some decision. Congress enacted the statute. Section 4(f)(1) of the statute refers to "reasonable factors other than age." The Commission must address what that means. And I have laid out my view as to what it means.

Senator KERRY. Well, I do not want to belabor that. I know my colleagues want to——

Senator DODD. John, just on that one point, maybe you can help us. I am looking here at a memorandum dated September 6, 1985, to Clarence Thomas from you, "Closed Agenda No. 3."

Mr. ZUCKERMAN. Senator, is there a number at the top of it?

Senator DODD. Yes. It is J1Z, No. 69. And there, in response to Senator Kerry's question—which I thought was an excellent line of questions—and I am quoting you—you say, "I recommend that you vote against authorizing litigation, because one, the staff's theory depends upon an adverse impact analysis which is not appropriate under ADEA."

Do you have that before you?

Mr. ZUCKERMAN. Yes, sir.

Senator DODD. I mean, there is a recommendation against it. I am wondering if you have some files here which would show one where you maybe recommended litigation. You might help your case in this particular case if you can identify some where you have actually recommended litigation.

Mr. ZUCKERMAN. In terms of my memos to the chairman recommending litigation under the Age Act, a number of the memos were copied, and provided to the committee; a number of others were produced to the committee but copies were not taken. I would be happy to submit a list of all those in which I recommended litigation under the Age Act.

Please understand this about the memos I did for the chairman. The Chairman and I have had countless discussions of the various legal issues under the Age Act and the other statutes that the Commission enforces. I have worked closely with him; we have talked countless numbers of times.

In doing memos just for the Chairman—these short memos which go to him on top of staff memoranda which do comprehensive analyses—I did not generally go into a comprehensive legal analysis. Particularly by September 1985, the Chairman was well aware of my analysis. He knew his analysis. This is not the kind of memo that would be appropriate from the general counsel. It was not intended to serve the purpose of a memo from the general counsel.

Senator DODD. But there are a number of similar types of memos based on staff analysis, where you as general counsel are recommending litigation because of violations?

Mr. ZUCKERMAN. I have not been general counsel. I have been just on the personal staff of the Chairman, working only for the Chairman.

Senator DODD. Well, I mean that, in a sense, where you have made recommendations, though, of a different nature than the recommendation made here.

Mr. ZUCKERMAN. There are a number of cases where I have recommended litigation under the Age Discrimination in Employment

Act. There are also a number of instances where I have recommended litigation although the general counsel and the staff recommended against litigation.

Senator DODD. Well, Senator Kerry, I commend you. I think, Mr. Chairman, that followed the line of questioning that I would have pursued here. But the last question, and I think you have sort of addressed it, but to kind of summarize, is that disparate impact is really not appropriate under ADEA, and that is your personal opinion.

Mr. ZUCKERMAN. No, sir. I do not think I said that in response to you either at the first hearing or in my submission to you. I do not think I said that in response to Senator Kerry, and I do not believe that.

Disparate impact has a role to play under the Age Discrimination in Employment Act. There is no doubt in my mind about that whatsoever.

Senator KERRY. Can I just interrupt you there and follow up where Senator Dodd is going?

Senator DODD. Surely.

Senator KERRY. Your memo says very clearly, "The staff's theory depends upon an adverse impact analysis which is not appropriate under ADEA."

Mr. ZUCKERMAN. Yes, sir; I do not have before me the underlying memos that would show what the facts were in this case. I do not have that information—and I do not recall this particular case whatsoever——

Senator KERRY. Let me interrupt you here. So what you are saying is—you are not saying that the adverse impact analysis is not appropriate across-the-board under ADEA; you are saying under the facts of this particular case it is not appropriate. Is that what you are saying?

Mr. ZUCKERMAN. Yes, sir.

Senator DODD. And then the question, John, is has there ever been a case based on disparate impact where you have recommended litigation.

Senator KERRY. That is right.

Mr. ZUCKERMAN. I do not recall having done so, but here is where I would say, Senator, there have been so few, and there have been so few where the staff even recommended going on an adverse impact theory, that I have reviewed.

Senator DODD. Why don't you look? It would help. I suggest you go back and look and see if there are any and maybe bring those together. It would help, I think, me, and it would maybe help Senator Kerry as well in this particular area.

Mr. ZUCKERMAN. I can go back and submit the total number of cases where it even arose. I have recollection of one, for example, where the staff was proposing going under an adverse impact theory, and I told the Chairman it looked to me like it was a disparate treatment case, that the employer had considered age, that the employer had intended to discriminate on the basis of age.

And indeed, one can infer that from disparate impact. I could not tell you offhand what that case was, or even when it was, but I remember that coming up once.

[Information supplied for the record follows:]

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ADDITIONAL EXPLANATION BY MR. ZUCHERMAN

I have prepared written memoranda for Chairman Thomas concerning 31 situations in which the Commission considered whether to authorize litigation under the Age Discrimination in Employment Act ("ADEA"). The Commission's staff recommended proceeding under an adverse impact theory in only two of these 31 situations. In one of those, I recommended that the Chairman vote to authorize litigation without relying upon the adverse impact theory (see document JIZ #4). In the other, I recommended that the Chairman vote against authorizing litigation because the adverse impact theory was not applicable and section 4(f)(2) of the ADEA sanctioned the behavior that the staff proposed to challenge (see document JIZ #69).

There have been many other situations where the Commission was considering whether to authorize litigation under the ADEA, and I discussed the matter with Chairman Thomas but did not write a memorandum to him. I recall one situation where I recommended that he vote to authorize litigation on the basis, at least in part, of the adverse impact upon older applicants of an element of an employer's hiring criteria. I also recall a situation where the Acting General Counsel recommended at first that the Commission authorize litigation under an adverse impact theory, but then changed his recommendation to a disparate treatment theory after the Commission rejected the adverse impact approach in that case. I recommended to Chairman Thomas from the outset that he vote to authorize litigation under a disparate treatment theory. I do not recall discussing with Chairman Thomas any other specific situations where the Commission's staff was recommending litigation under the ADEA under an adverse impact theory.

Senator KERRY. I just wanted to pursue a little bit—I know I have taken a certain amount of time, and my colleagues are here, and Senator Metzenbaum wants to get going——

Senator DODD. No, no. You are doing very well.

Senator KERRY. In the same line of questioning—well, let me reserve that, perhaps, until afterwards. But the EEOC, as well as the area we have covered, obviously—and again this is simple—the EEOC is also responsible for enforcing title VII of the Civil Rights Act; correct?

Mr. ZUCKERMAN. Absolutely.

Senator KERRY. You do not have any issue with that?

Mr. ZUCKERMAN. Certainly not.

Senator KERRY. And the Commission has adopted regulations, has it not, that address the issue of affirmative action; correct?

Mr. ZUCKERMAN. Yes.

Senator KERRY. No issue about that?

Mr. ZUCKERMAN. That is right.

Senator KERRY. Regulations, Commission, they exist?

Mr. ZUCKERMAN. That is right.

Senator KERRY. And those regulations make clear that the Commission's understanding under title VII reflects a clear—and I am quoting—"a clear Congressional intent to encourage voluntary affirmative action," 29 CFR 1608.1(a); agreed?

Mr. ZUCKERMAN. That is right, yes, sir.

Senator KERRY. Clear intent. The regulations also support the use of, quote, "reasonable affirmative action which may include goals and timetables and other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees." That is correct?

Mr. ZUCKERMAN. Yes, sir.

Senator KERRY. And you are aware, I am sure, of the directive issued by the acting general counsel that EEOC attorneys should not request or agree to the use of any affirmative action relief in the form of goals or timetables, are you not?

Mr. ZUCKERMAN. Yes.

Senator KERRY. Do you agree with or disagree with that directive?

Mr. ZUCKERMAN. As I have said, I do not believe the Commission should seek in litigation to order an employer to engage in preferences.

Senator KERRY. Just the directive; do you agree or disagree with that directive?

Mr. ZUCKERMAN. I agree that—well——

Senator KERRY. Do you agree with the directive?

Mr. ZUCKERMAN. Yes, sir.

Senator KERRY. That directive was issued without a vote or public announcement by the Commission that it was departing from established policy, was it not?

Mr. ZUCKERMAN. It was——

Senator KERRY. Yes or no? Was it?

Mr. ZUCKERMAN. It was issued without a vote or announcement. It was not contrary to the policy that you just read, however, Senator. What you read, Senator, discusses what would be permissible on a voluntary basis. What the acting general counsel was addressing is what would be sought in litigation.

Senator KERRY. No, not "sought," not "sought."

Mr. ZUCKERMAN. Or would not be sought.

Senator KERRY. I said "should not request or agree to the use of." Now, that is not seeking. That is saying "We are not going to do," as part of the relief.

Mr. ZUCKERMAN. As part of the relief in litigation——

Senator KERRY. Correct.

Mr. ZUCKERMAN [continuing]. Which is to order an employer to engage in——

Senator KERRY. I understand what it is to do. But what you are saying is that your attorneys will not enter into that agreement, even though the established policy of the Commission is to accept that as part of relief.

Mr. ZUCKERMAN. That is not a stated policy of the Commission.

Senator KERRY. Well, you just agreed that it was.

Mr. ZUCKERMAN. No, sir. You did not in your question refer to it as part of relief. The regulation you cited talks about an employer voluntarily engaging in certain practices. We discussed this last time in terms of the *Weber* decision, where the Supreme Court said that an employer could voluntarily engage in certain racial preferences or discrimination, an employer could make decisions on the basis of race, under certain limited circumstances.

Senator KERRY. Let us try to understand it, then.

Mr. ZUCKERMAN. Then we get to the point of whether a court may order it. When we are talking about what the general counsel would agree to, it would be the general counsel agreeing to a court order requiring an employer to take race into consideration.

Senator KERRY. Yes, but as you and I well know—I mean, I have done litigation before, and you often enter into a stipulated agreement, both sides, as a form of relief, and the court order is merely a matter of form; the court order is a matter of form. But both attorneys on both sides have to agree to the relief. And they come

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before the judge and they say, "Are both sides agreed?" and the judge says, "Fine. I am issuing the following order."

And what you are saying is that you are not going to enter into those stipulated agreements as to relief, by which both parties will say, "OK, we are willing to use this as a form of relief." Now, that is voluntary. That is voluntary.

Mr. ZUCKERMAN. It is not voluntary when the gun is pointed at your head, and——

Senator KERRY. And what is the gun? The litigation?

Mr. ZUCKERMAN. The gun is the litigation, Senator, and the threat of contempt sanctions if the employer does not live up to its agreement to discriminate.

Senator KERRY. And you do not think it is an appropriate role of the EEOC? I mean, isn't that what enforcement is all about?

Mr. ZUCKERMAN. Enforcement is all about requiring employers not to consider race. I consider it to be fundamentally contrary to the principle underlying title VII to require an employer to consider race.

Senator KERRY. Not requiring. The employer does not have to enter into this agreement if he does not want to.

Mr. ZUCKERMAN. But if they do enter into it, they are subject to a court order. If they violate the order by not discriminating, they are then in contempt of court. That is then requiring the employer to consider race.

We have a statute that was designed to make race irrelevant in employment, and instead, we would be ordering an emoloyer to consider race.

Senator KERRY. If an employer does not want to enter into this stipulated agreement, he does not have to; he can litigate it out; correct?

Mr. ZUCKERMAN. That is true, Senator.

It is not only a matter of it not being appropriate to order an employer to discriminate; we have the statute itself, which provides that no court order may require the hiring of anyone who was not hired for any reason other than discrimination on the basis of race. If we go in and ask a court to require an employer to hire someone on the basis of their race, someone who did not suffer discrimination, the court does not have the authority to enter that order under title VII. That is quite different from what a company can do voluntarily—a point made by the Supreme Court in *Weber.*

And the question of whether a court may order this is now squarely before the Supreme Court in at least two cases that have been briefed and argued.

Senator KERRY. Well, Mr. Zuckerman, I have got to say to you, I am not trying to dominate this thing, and I only have one other line of questioning, and I do not want to overly pursue this one, because we could obviously argue for a long time. But I have got to tell you just from a commonsense perspective, I mean, just fundamental common sense, there is an enormous difference between what you are saying to me and the directives of the EEOC which you have affirmed in saying are, in fact, the policy of the EEOC.

And if you are going to tell me on the one hand that the EEOC embraces the notion that reasonable affirmative action may include goals and timetables—that is your policy, that it may include

goals and timetables—and in the next breath, you are going to tell me that when it has gotten to the point of contentiousness that you have litigation, and your attorneys are prohibited by directive from actually entering into an agreement that is, in fact, the stated policy of the Commission, then we have got the worst kind of gobbledygook, duplicity, charade going on. And the message is very clear, the message is very clear. All it says is a goal or a timetable.

You are telling me it is not appropriate for your attorneys to agree to a goal, to agree to a timetable, as a matter of stipulated agreement under the court, and you are not going to recommend that?

I am astonished. I am frankly astonished.

Mr. ZUCKERMAN. Senator, what we need to do is to get employers out of the business of considering a person's race, color, sex, religion, or national origin. As part of relief, we need to force employers to engage in affirmative action.

I do not see anything affirmative—I consider it to be the height of regression——

Senator KERRY. In having a timetable? There is nothing affirmative in having a timetable?

Mr. ZUCKERMAN [continuing]. To require an employer to take a person's race into consideration, Senator.

Senator KERRY. That is not what we are talking about.

Mr. ZUCKERMAN. But that is what it is.

Senator KERRY. You are getting into the fundamental question of the law. I am getting into the question of whether or not as a matter of relief you are going to have a timetable or a goal.

Mr. ZUCKERMAN. The goal is for employers not to consider race; that is the goal of the statute. The timetable was July 1, 1965. Anything short of that is unacceptable.

When you are talking about goals and timetables, what that has come to mean is that employers are given the goal of having *x* percent of their work force to be from *y* group by a certain date. And in that, you are telling the employer to take whatever the factor is into consideration in its hiring process. If it meets the goal, it does not tell you whether that employer is discriminating or not. If it does not meet the goal, it does not tell you whether that employer is discriminating or not——

Senator KERRY. Those are the other parts of the agreement. Those are simply the other parts of the agreement.

Mr. ZUCKERMAN. But inherent in that part of the agreement——

Senator KERRY. Do you know the business community supports goals and timetables?

Mr. ZUCKERMAN. Some do, and some do not.

Senator KERRY. Does that tell you anything?

Mr. ZUCKERMAN. What it tells me is that some like the certainty of it, that they are told, "Well, if you will have 8 percent of your workforce of a certain group by a certain date, we will in effect consider you to be a clean employer." And they like that certainty. And therefore, they find that to be a useful thing, if the EEOC is saying, "Do that, and we will leave you alone."

What I would want to do as general counsel would be to go to employers and say:

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What I want you to do is not consider a person's race for any purpose whatsoever in your hiring, in your promotion, in your training, in your setting wages, or in anything else in connection with that person's employment. And if you consider race, then you are violating title VII, and we will get an order requiring you to make whole every single person who suffered discrimination, requiring you to engage in affirmative action, and enjoining you from considering race in the future. And if you do it again——

Senator KERRY. It sounds wonderful; it really sounds wonderful. But if we were to do that, we would be stepping back to where we were when we began, when we decided we had a problem. And, I think, a lot of people in this country are aware of that.

Let me just ask you one last question, or series, if I can.

Mr. ZUCKERMAN. I do not understand that. I mean, we began with the problem because there was no law against discrimination.

Senator KERRY. And if it went to what you are saying, I think we would be right back to where we were, where there was almost no law.

Mr. ZUCKERMAN. Well, I must respectfully disagree, Senator. What I am talking about is enforcing vigorously, the very point being——

Senator KERRY. Vigorous enforcement does not include a goal or a timetable?

Mr. ZUCKERMAN [continuing]. That race is not to be considered. We have got to make that point to American business, to American unions, that race is not to be considered in the employment process, period. It is an irrelevant factor. It is unlawful to consider it. And if you insist upon considering it, then we are going to come down hard on you. So just stop considering it, period.

Senator KERRY. How are you going to come down hard on them? What is the standard of measurement going to be?

Mr. ZUCKERMAN. The standard will be if they consider race, that is a violation.

Senator KERRY. And how are you going to make a judgment? Supposing they say to you, "We did not consider race, and that is why we do not have any blacks"?

What is the standard of judgment going to be?

Mr. ZUCKERMAN. The standard of judgment is we look at the facts of the case——

Senator KERRY. I mean, you do not have any goals, you do not have any timetables, you do not have anything—how are you going to know whether they are meeting something or not meeting something?

Mr. ZUCKERMAN. What they have to meet is that they do not hire on the basis of race. If they are hiring——

Senator KERRY. Well, they will tell you, "We did not hire on the basis of race."

Mr. ZUCKERMAN. And we look at what they actually did, and we investigate, and we look and we see——

Senator KERRY. "We hired on the basis of quality. These people were all qualified; the others were not."

Mr. ZUCKERMAN. And let us look if that is true. And if it is not true, then we infer that they were discriminating on the basis of race.

Senator KERRY. It would be quite a standard. It would be a remarkable standard, and I do not know how you would apply it.

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Mr. ZUCKERMAN. The standard set by the courts is if, let us say, a qualified black person applies for a job, and they are not hired, and a white person is instead hired, and the black person now files a charge with us—on that alone, if this qualified black was passed over, we now have at least a prima facie case——

Senator KERRY. What you are saying is just so absolutely absurd when measured against the notion of affirmative action. You are going to come to Roxbury, MA, and tell me that the blacks there are going to be as qualified as the whites in Lexington and Concord? I mean, this is contrary to the whole notion of why we passed affirmative action in the first place.

You simply do not understand what you are talking about.

Mr. ZUCKERMAN. There is nothing about title VII, Senator, that talks about requiring an employer to hire a less-qualified person because of that person's race. Perhaps under some quota concepts, that notion might arise. But even under goals and timetables, generally, there is no suggestion that one has to pass up a qualified person in order to hire a less-qualified person.

What I would say there, Senator, in terms of affirmative action, what should be required is to tell employers, "OK, we want you to go out and provide training opportunities for those who have been denied educational opportunities in the past, for those who have been denied a fair shake in society."

Senator KERRY. Are we going to do that with the administration's additional money for employment and training that has been cut for the last 6 years?

Mr. ZUCKERMAN. I think an employer would find that affirmative action is good business for itself; it does not need the Government to finance it. And we can require affirmative action of an employer if it has been discriminating in the past. Part of the affirmative action to require of them should be to provide training opportunities.

And it is a fact that because of the nature of our society, that those training opportunities reserved for those who have been denied a fair shake in the past will tend to be taken by minorities—as they should be. But there is no reason to tell an employer to restrict its training opportunities on the basis of race. That is contrary to the very concept of title VII.

Senator KERRY. I have some questions on the Equal Pay Act. In fairness, I know Senator Metzenbaum would like to ask some questions.

I would like to ask that those questions be submitted for the record.

Senator NICKLES [presiding]. Without objection. Senator Kerry, I appreciate that.

Senator KERRY. Thank you, Mr. Chairman, and I apologize for that.

[Responses of Mr. Zuckerman to questions submitted by Senator Kerry follow:]

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United States Senate
COMMITTEE ON LABOR AND HUMAN RESOURCES
WASHINGTON, DC 20510

Senator John Kerry

Questions for Mr. Jeffrey Zuckerman (for the record)

1. The EEOC is responsible for enforcing the Equal Pay Act. The Commission has issued regulations as part of its enforcement of the law. The EEOC has a regulation on confidentiality concerning investigation of alleged EPA violations (29 CFR 1620.20(c)). The regulation states that "the identity or identifying details of persons giving information as to violations of the Act shall not be disclosed unless necessary in a court proceeding". In July 1985 the Commission issued an amended regulation clarifying that complainants and witnesses "may elect to keep their identities and identifying details confidential" under the EPA, as under Title VII and the ADEA (50 Fed. Reg. 30699).

Is it your position that an employer has an absolute right to see any statement made to the Commission by an employee in connection with an EPA complaint or investigation?

2. As a member of the Chairman's staff, did you participate in a meeting with other Commission staff to discuss proposed

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new regulations for EPA enforcement? If so, when did such discussions take place?

3. Did you take the position at that meeting that an employer has a right to see any statement made by an employee in connection with an administrative case against that employer?

4. Did you insist that an administrative case should be terminated unless the statement was shown to the employer?

5. As General Counsel, what credence would you give to confidential statements submitted by employees disclosing possible violations of Title VII, the ADEA, or the EPA?

6. Would you make a decision to prosecute wholly or partially on the basis of these statements without disclosing the identity of the speaker to the employee?

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1217 North Belgrade Road
Silver Spring, Maryland 20902

April 22, 1986

The Honorable Orrin G. Hatch,
Chairman,
Committee on Labor and Human Resources,
United States Senate,
Washington, D.C. 20510.

Dear Chairman Hatch:

I am pleased to enclose my responses to the written questions Senator Kerry submitted in connection with the Committee's consideration of my nomination to serve as General Counsel of the Equal Employment Opportunity Commission.

I would be happy to answer any further questions Senator Kerry may have, or to meet with him at his convenience.

Sincerely yours,

Jeffrey I. Zuckerman

(Enclosure)

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Questions for Jeffrey Zuckerman,
submitted by Senator Kerry

1. The EEOC is responsible for enforcing the Equal Pay Act. The Commission has issued regulations as part of its enforcement of the law. The EEOC has a regulation on confidentiality concerning investigation of alleged EPA violations (29 CFR 1620.20(c)[sec: 29 CFR 1620.19(c)]). The regulation states that "the identity or identifying details of persons giving information as to violations of the Act shall not be disclosed unless necessary in a court proceeding". In July 1985 the Commission issued an amended regulation clarifying that complainants and witnesses "may elect to keep their identities and identifying details confidential" under the EPA, as under Title VII and the ADEA (50 Fed. Reg. 30699).

Is it your position that an employer has an absolute right to see any statement made to the Commission by an employee in connection with an EPA complaint or investigation?

Answer: No.

2. As a member of the Chairman's staff, did you participate in a meeting with other Commission staff to discuss proposed new regulations for EPA enforcement? If so, when did such discussions take place?

Answer: I attended such meetings on November 1, November 15 and December 13, 1984; November 20, November 27 and December 12, 1985; and January 23 and February 12, 1986.

3. Did you take the position at that meeting that an employer has a right to see any statement made by an employee in connection with an administrative case against that employer?

Answer: No.

4. Did you insist that an administrative case should be terminated unless the statement was shown to the employer?

Answer: No.

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5. As General Counsel, what credence would you give to confidential statements submitted by employees disclosing possible violations of Title VII, the ADEA, or the EPA?

Answer: Where a confidential statement submitted by an employee discloses a possible violation of one or more of those statutes, the situation should be investigated in order to determine whether there has been a violation.

6. Would you make a decision to prosecute wholly or partially on the basis of these statements without disclosing the identity of the speaker to the employee?

Answer: If I were General Counsel, I would decide whether to recommend litigation without disclosing to anyone outside the Commission the identity of any person who had submitted a confidential statement. I would recommend litigation if the evidence that could be disclosed at a trial were sufficient to establish our case.

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Senator KERRY. The only last comment I would like to make is that we have had a program for the Vietnam veterans in this country which has involved voluntary participation by employers, involving a very significant tax credit for the employers if they involve themselves, and the employers do not even involve themselves in that.

So I have just got to tell you that I am skeptical.

Thank you, Mr. Chairman.

Senator NICKLES. Senator Kerry, thank you very much.

Senator Metzenbaum.

Senator METZENBAUM. I have listened to this questioning by Senator Kerry, Senator Kennedy, Senator Dodd—I was not here if Senator Simon had questions; I was out. And I have to preface my comment by saying, Mr. Zuckerman, I do not know when I have ever heard any candidate for nomination who has been so personally disappointing and so insensitive, in my view, to what is really involved in this entire issue.

Mr. Zuckerman, what is the difference between an affirmative action goal and a quota?

Mr. ZUCKERMAN. People use goal, the notion of a goal, in different ways. In some cases, people have used goals in ways that I would say make them just quotas; for example, where it has been required of a company that it meet the goal that x percent of its labor force or x percent of its hires be from a certain group or else suffer a certain penalty. In other cases, goals have been part of a more fluid, or perhaps a more flexible kind of approach. The word goal has been applied to an enormous number of different things.

Senator METZENBAUM. Well, now would you be good enough to answer my question? You told me how it has been interpreted, but I asked you, Mr. Zuckerman, what is the difference between an affirmative action goal and a quota.

Mr. ZUCKERMAN. Well, that is where, Senator, it depends who is talking about an affirmative action goal.

Senator METZENBAUM. I am asking you—you, not somebody else

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Mr. ZUCKERMAN. I do not propose goals based on race or sex or religion or national origin as part of affirmative action.

Senator METZENBAUM. I am not asking you that. I am asking you what is the difference between affirmative action quota and a goal. And I am asking you, who aspires to be the general counsel of the EEOC, what are the differences, because the law does make a distinction.

Mr. ZUCKERMAN. In some cases, I would say, Senator, there is no difference. In some cases, the word goal has been used simply as a quota.

For example, take the second circuit. The second circuit says in essence that something is a goal and therefore permissible if it is intended to raise the representation of a specific group to a certain level, and it is only an impermissible quota if it is intended to maintain a group at a particular level.

To my mind, if you say your goal is to hire x percent of a certain group until they constitute y percent of your labor force, and you must do that, that is your goal, and you must meet your goal or you will be penalized, to my mind, that is a quota.

The second circuit says no, that is not a quota; that is a permissible goal.

Senator METZENBAUM. Isn't the term quota understood by both sides to mean a mandatory numerical target, one that must be met?

Mr. ZUCKERMAN. That is a quota, and that is also a way that goals are used.

Senator METZENBAUM. And doesn't the term goal normally mean a voluntary target that should be reasonably attainable through good faith employer efforts, but, quote, "may not be a rigid and inflexible quota which must be met"? Isn't that what the Department of Labor regulation actually says?

Mr. ZUCKERMAN. I accept that that is what it says, Senator.

Senator METZENBAUM. But you do not accept that as the distinction?

Mr. ZUCKERMAN. As I say, Senator, I gave an example of the second circuit. The word "goal" is used many different ways by many different people in many different contexts. If all that a goal were were what you described, I would still say then it has inherent within it the requirement that an employer take a prohibited factor into consideration as it is viewing people. As applicants come before the employer, even taking the definition you just read, Sentor, inherent in the employer's obligation to make a good faith effort to meet its goal, it would have to consider a prohibited factor. Let us say the goal is based on race. You would have to expect the employer, as two applicants of different races come before it, to be thinking about the race of those applicants.

I submit, Senator, that the basic principle of title VII and a principle, Senator, to which I am totally committed, is that when those two people come before the employer, it should not consider their race. Their race is totally irrelevant to the employment decision. And the government should not be doing anything to require or push or encourage an employer to be considering the race of people who come before it applying for a job.

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The goal of title VII is to make race an irrelevant factor in the employment decision, and I do not see how pushing the employer to consider it is consistent with title VII, Senator. I do not see it.

Senator METZENBAUM. What about the corollary of that, and that is when the employer does consider it, your problem is that unless there is evidence that the individual himself or herself has been discriminated against, then there is no action that would lie against the employer; and if the employer had never employed a black person in its entire history and had had plenty of applicants, you would still say there was no provocation, no reason for action, unless there was one individual where you could prove that the employer discriminated against this person or that person?

Mr. ZUCKERMAN. No, Senator. I think in the kind of facts you are now suggesting, I think there, just from the numbers alone, one can infer, reasonably infer, that this employer has been engaging in discrimination.

I would say further that under those circumstances, it should be possible to find specific instances of people who suffered the discrimination——

Senator METZENBAUM. It should be, but what if it is not? What if it is not?

Mr. ZUCKERMAN. If it is not, well, that is where we come into the situation of the *Sears* case, for example. We may be satisfied that we have the numbers, and that from the numbers it is clear that discrimination occurred. But then we go to court, and the court says, "You are saying that for years this company engaged in a pattern or practice of discrimination, regularly discriminated against this group, and you, EEOC, cannot produce one person to go on the witness stand and say that they suffered discrimination."

That happened to us in the *Sears* case. I believe it happened to us in a case against IBM. The courts say, "You know, EEOC, I just find it impossible to accept that you have years of a pattern of discrimination, and you cannot put one person on the witness stand." In the *Sears* case the court also said, "Your statistical work was not very good, either."

So I say, Senator, as a concept, I would agree that statistics alone can provide a reasonable inference of discrimination and can be sufficient to prove discrimination.

But, I would say as a practical matter, Senator, as a practical matter in litigation, we have got to go before the courts and put before them people who suffered the discrimination. And what that means, Senator, is that we have to go out and investigate; we have to go out to the places where people live, to the places where people drink, to the places where people meet and talk, and go and find the people who suffered the discrimination.

It is a hard job, but Senator, as we discussed last time, the EEOC on the enforcement side, in terms of numbers of lawyers, has the resources to do so much more than we have been doing. And with the consent of the Senate, I would look forward to leading those lawyers to doing so much more than they have been doing. Where there is that kind of pattern, we should find some of the people and put them on the stand for the judge to see. And then the judge cannot say, "This is an incredible story." The judge has the people

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right in front of him or her, and says, "I understand the discrimination that has occurred."

That to my mind is how you go and prove these cases, and what we should be doing in order to have the proof necessary to win these cases.

Senator METZENBAUM. I always thought I was a pretty good filibusterer until you came along. [Laughter.]

Mr. ZUCKERMAN. I am sorry, Senator.

Senator METZENBAUM. Isn't it naive to think that an employer who discriminates will identify his victim by telling him or her that he is refusing to hire or promote the individual because of their race or sex? Isn't that sort of naive to expect that?

Mr. ZUCKERMAN. First off, it does happen, and particularly on the sex side, where we find that employers will just pointedly say to someone, "Gee, you know, a woman cannot handle this job."

I am not saying that we expect the employer to come to us and say, "Gosh, I did not hire that guy over there because he is black." Employers have caught on by now that it gets them in trouble to say that. Of course, employers are going to come up with some sort of pretext, which is precisely why the law has been developed, quite correctly, that when you have the case of the qualified person of one race passed over, and the employer keeps the job open and then hires someone from another race, that then establishes a prima facie case of discrimination. The employer then has the burden of coming in and articulating a nondiscriminatory reason for why they hired the selected person. And then we can say, "Well, you know, that is what the employer says, but that is pretext, and we say it is pretext because of one, two, three, four, or five of the following factors." And these factors can include statistics, they can include what the employer said, they can include what the employer did or did not do in terms of recruitment. There are all sorts of things we can show to demonstrate that this employer is just making up a story.

But we start by proving a prima facie case of race discrimination by showing that the employer passed up the qualified person of one race, and then hired a person of another race.

Senator METZENBAUM. Mr. Zuckerman, in document No. 5 of your committee submission, dated December 3, 1984, you urged Chairman Thomas to reject a proposed settlement with an employer in large part because it—now I am quoting you—"establishes quotas—excuse me—goals for females, blacks and Hispanics in various job categories."

Now, I could understand your use of "quotas" and "goals" in that language if that were a slip of the tongue. But that is not what it was. You were deliberately blurring the legal distinction between goals and quotas that exists in your own regulations.

Frankly, Mr. Zuckerman, that effort on your part, "establishes quotas—excuse me—goals" in a letter was pretty unprofessional, wasn't it, really, not the kind of thing that you would expect a lawyer to be doing in writing a communication to his or her client?

Mr. ZUCKERMAN. Senator, I do not have the actual proposed agreement in front of me. I have already pointed out that the word "goals" has been used in many different ways, some of which I think everyone would agree are really the same as quotas, such as

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when one says, "You must meet this goal or else suffer some penalties." If I may read from that same memo, what I said was—what I pointed out was that nothing was being done for people who had suffered the discrimination And I said, quote, "If the charge has any basis in fact"—and understand this was to be a settlement before we had decided whether there was in fact a basis for the charge of discrimination—"If the charge has any basis in fact"——

Senator METZENBAUM. Mr. Zuckerman, I am not going to let you obfuscate the issue. I did not ask you what you concluded in the memo. I am talking about the professionalism of a lawyer who writes a letter and puts into it "establishes quotas—excuse me—goals for females, blacks and Hispanics." And what I am talking about is why would you leave those two words in there? Why would you put that in? Were you trying to make a point?

Mr. ZUCKERMAN. In that context, Senator, I take it that it was a quota, that the goal had the effect of a quota. The principal point I was making in this memo was that we should be doing something for the people who had suffered the discrimination; that we should be going and finding the people who were not hired, were not promoted, or were otherwise discriminated against. We should be finding those people, and we should be making them whole. We should be getting them the jobs they would have had. We should be getting them the money they would have earned. The principal thrust, I would say, of this memo, is that what we were failing to do anything for the people who had suffered the discrimination. And I believe very strongly, Senator, that wherever discrimination has occurred, the Commission should do anything and everything it can to get for those people every single thing they would have had but for the discrimination they suffered.

Senator METZENBAUM. But you were proposing that the settlement that had been agreed to be rejected, and then you were coming in with your flippant remark and trying to indicate your view that quotas and goals are pretty much the same. Isn't that what you were doing?

Mr. ZUCKERMAN. No, sir. The result of rejecting a proposed settlement is that the charge would then go on to be investigated; and a determination would be made. If there is a determination that discrimination occurred, and then a failure to conciliate satisfactorily, it would then be taken to litigation.

Senator METZENBAUM. This had been investigated, and that is the reason it had gone to settlement. Now you wanted to turn down the settlement, put in a flippant remark, and then you want to start the whole process over again. And meanwhile, the individual or individuals involved would have been the ones who suffered.

Mr. ZUCKERMAN. Senator, as you see from the memo, this was a predetermination settlement. This was before the conclusion of an investigation, before a determination was made as to whether or not discrimination had occurred. Essentially, what the employer did—and it is a fairly common thing for employers to do—is that early in an investigation after a charged is filed, sometimes later in the investigation, an employer will come to us and say, "Listen, I will settle this. You are charging me with a pattern and practice." This memo is discussing a proposed settlement of a Commissioner's charge, and by definition that means a charge that there has been

a pattern or practice of discrimination. Some Commissioner has charged that this employer had engaged in a pattern or practice of discrimination.

Employers come to us and say, "Listen, I will settle the charge. If you will drop the charge, not pursue it any further, never take me to court on this charge, I will agree to goals and timetables."

In some cases, the goals may be subject to some penalties if missed.

To my mind, Senator, that is a cheap way out for an employer. More importantly, it is an unfair way out for the people who have suffered the discrimination. The people who suffered the discrimination are entitled to relief.

And what we do if we agree to this type of settlement is give them nothing for having suffered the discrimination. They end up no better off than if the EEOC had never been established in the first place. And that to my mind, Senator, is an unfair and improper way to go about enforcing the statute. The people who suffer the discrimination have got to be made whole. And that is the way to get employers to stop discriminating in the first place.

Senator SIMON. Would my colleague yield for just a second?

Senator METZENBAUM. Yes.

Senator SIMON. I have to get to another meeting, but I do have some questions I want to submit in writing to the witness.

Senator NICKLES [presiding]. Senator Simon, thank you very much. I appreciate that.

Mr. ZUCKERMAN. I will be happy to respond to any questions, Senator.

Senator SIMON. Thank you.

[Information received for the record follows:]

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1217 North Belgrade Road
Silver Spring, Maryland 20902

May 7, 1986

The Honorable Orrin G. Hatch,
Chairman,
Committee on Labor and Human Resources,
United States Senate,
Washington, D.C. 20510.

Dear Chairman Hatch:

I am pleased to enclose my responses to the set of written questions Senator Simon sent to me on April 11, in connection with the Committee's consideration of my nomination to serve as General Counsel of the Equal Employment Opportunity Commission.

I would be happy to answer any further questions Senator Simon may have, or to meet with him again at his convenience.

Sincerely yours,

Jeffrey I. Zuckerman

(Enclosure)

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Questions for Jeffrey Zuckerman,
submitted by Senator Simon

Question: Since FY 1980, the number of victims of discrimination who received some type of relief or settlement through the filing of a charge with the EEOC has declined drastically. In Fiscal Year 1980, 32.1 percent of all cases filed at EEOC were settled. In Fiscal Year 1985, only 14.4 percent of all cases filed at EEOC were settled. In addition, litigation activity has fallen by 22 percent -- with only 286 cases having been filed in the most recent fiscal year (1985). How do you explain this dramatic decline and what would you do to improve the EEOC's performance record as its General Counsel?

Answer: I have been at the EEOC since August 1984. Therefore, much of my response to this question is based upon information I have obtained from others.

I turn first to the decline since FY 1980 both in the rate at which charges are settled, and in the number of people who received some type of relief or settlement. From FY 1979 to FY 1982, the Commission's staff was instructed to concentrate their efforts toward settling charges, or otherwise moving them through the system quickly and with minimal or no investigation of their merits. Each of the agency's District Directors was assigned the goal of having negotiated settlements account for at least 45% of the district's charge resolutions, and was judged, in part, by his or her ability to meet this standard. This emphasis on rapid processing of charges and quick settlements was sharply criticized in a 1981 report by the General Accounting Office:

> The rapid charge process has overemphasized obtaining settlement agreements with the result that EEOC has obtained negotiated settlements for some charges on which GAO believes there was no reasonable cause to believe that the charges were true. The settlement agreements for these charges have little substance--they normally provide for employers to remove information related to the charge from the charging party's personnel file--and they distort the results of the rapid charge process by inflating the number of settlements.

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> Negotiated settlements of these charges also undermine EEOC's credibility because
>
> --charging parties and employers said they were pressured into settlements they disagreed with and
>
> --charging parties were led to believe that, since the charges were resolved with settlement agreements, their charges had merit but EEOC handled them ineffectively.
>
> GAO recommends that EEOC not obtain settlement agreements for charges that, absent a settlement, would be closed as no cause. When EEOC determines that persons have filed such charges, they should be advised to withdraw them or EEOC should close the charges with a finding of no cause.

Further Improvements Needed in EEOC Enforcement Activities, GAO Report No. HRD-81-29, at i-ii (April 9, 1981). GAO also concluded that "statistics on such settlements distort the results of the rapid charge process by inflating the number of 'positive' resolutions and imply that more charging parties are getting substantive relief than is the case." Id. at 15.

GAO's criticism was taken seriously. In early 1982, then Acting Chairman Shattuck cancelled the goal that 45% of each District's charge resolutions be negotiated settlements. Later that year, when Chairman Thomas came to the Commission, he asked the staff to review the charge processing system. In 1983 the staff proposed, and the Commission approved, a change in emphasis from rapid settlement to full investigation. The new goal was to investigate each charge as thoroughly as necessary to determine its merits, in order to find "cause" on meritorious charges and secure meaningful relief for those charging parties. This shift in emphasis toward securing full relief for all victims of discrimination was further emphasized by the enforcement policy the Commission adopted in 1984, and the policy statement on relief it adopted in 1985. The basic thrust of this shift has been to move the Commission away from "claims adjustment" and toward vigorous law enforcement. Where discrimination occurs, those who suffer it should not be forced or pressured to settle for less than they deserve. These individuals are entitled to have the Federal Government vindicate their rights by securing full relief for them -- through negotiation where possible, and through litigation whenever necessary.

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With respect to the downturn in case filings after FY 1981, I have been told that toward the end of 1980, the Commission made a concerted effort "to clean out the pipeline." Furthermore, I have been told that the emphasis on rapid settlements and minimal investigation of charges under the rapid charge process often made it impossible to bring litigation when settlement efforts failed. Also, I understand that there was a great deal of turmoil within the Commission's Office of General Counsel in 1981-82, which may have contributed to the decline in case filings.

Whatever were the reasons for the drop-off in case filings after FY 1981, the situation is already improving, as evidenced by the following table:

Cases Filed by the EEOC
FY 1980-FY 1986

	FY 80	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86 (1st half)
Title VII	200	229	101	82	130	172	107
ADEA	47	89	28	33	67	96	50
Equal Pay Act	79	50	35	21	25	18	14
Statutory	326	368	164	136	222	286	171
Subpoena Enforcement	32	76	77	59	88	125	40
TOTAL	358	444	241	195	310	411	211

The results for the first half of FY 1986 are encouraging. Historically, the first half of any year has accounted for only about one-third of the total case filings that year. Although, we anticipate a more even distribution of case filings this year, we may still set a new record.

While substantial progress has been made, there is still a great deal more that could be done to enhance the effectiveness of the Commission's enforcement efforts. If confirmed as General Counsel, there are a number of steps I would like to take toward that end.

First, the Commission's determination to bring suit in every situation where "cause" is found and conciliation fails must be fully implemented. In FY 1984 there were 1,603 unsuccessful conciliations, and in FY 1985 there were another 1,621. If confirmed as General Counsel, I would look into why most of these cases were never presented to the Commission for litigation authorization, and eliminate any roadblocks I found.

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Furthermore, while the recent overall trend in case filings is positive, as are the trends in Title VII and age discrimination litigation, I am concerned about the decline in litigation under the Equal Pay Act. If I were General Counsel, I would try to find out why this decline has occurred, in order to correct any problems that may be causing it.

Also, numbers alone do not tell the entire story. The Commission's recent increase in case filings under the Age Discrimination in Employment Act is admirable. The vast majority of these cases challenge age discrimination in the public sector. These cases should be brought, but we should also be bringing more cases challenging age discrimination in the private sector. The large number of cases brought and won by private sector victims on their own behalf testifies to the scope of the problem. If I were General Counsel, I would look for the reasons why the EEOC is not bringing more cases challenging private sector age discrimination, and try to correct any problems I found.

If confirmed as General Counsel, I would also try to contribute to the continuing effort by Chairman Thomas and the Commission's staff to improve the investigative process. The General Counsel is not responsible for the investigation of charges. The investigative staff is supervised by the Director of the Office of Program Operations (the "Program Director"), who reports to the Chairman. However, the Commission has directed the District Directors (who supervise the investigative staffs in the district and area offices) to consult with their Regional Attorneys (who are supervised by the General Counsel) before making the determination as to whether there is reasonable cause to believe that discrimination has occurred in any particular situation. When the Commission adopted the policy of bringing suit in every case where reasonable cause is found and conciliation fails, I was concerned (as were Chairman Thomas, the Program Director and many others) that there might develop a tendency toward "no reasonable cause" findings in close cases, in order to avoid having the Commission second-guess these decisions. To deal with this potential problem, the Office of Program Operations audits a sample of each district office's charge closures. I think the General Counsel should similarly review the recommendations of the Regional Attorneys, in order to make sure that valid complaints are not being rejected because of insufficient or incorrect legal analysis.

The General Counsel, the Regional Attorneys and their staffs should also play an active role in making sure that the investigative staff understand the Commission's policies. I am very concerned about reports I have heard that at least some members of our investigative and legal staffs believe that the Commission does not want statistics ever to be considered

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as evidence of discrimination; or that the Commission wants each victim of an employer's discrimination to be identified before it can be found that the employer engaged in discrimination against a class of people, or in a pattern or practice of discrimination. If I were General Counsel, I would work with the Chairman and the Program Director to correct these and any other misimpressions the staff may have.

As General Counsel I would also hope to work with the Program Director to ensure the quality of charge investigations. There have been instances where the Commission had to address whether to authorize litigation in particular cases although key facts were missing from the investigative record. As a result, good cases may sometimes not have been authorized, and bad cases may sometimes have been authorized. I would like to build upon the work the Acting General Counsel and the Program Director have already done to improve our investigations in order to avoid such situations in the future.

Also, it is not enough just to file cases. The General Counsel should actively supervise the Regional Attorneys, to ensure that all cases are prosecuted expeditiously and effectively. The 1981 GAO Report criticized the Commission's frequent delay in filing cases after conciliation failed. Id. at 22-23. There are also often extensive delays in prosecuting cases after they are filed. Delay cheats the people whose rights we seek to vindicate. I find it incredible that in the past, the General Counsel generally paid no attention to cases after they were authorized by the Commission. Indeed, the General Counsel often did not even know whether any particular case had been filed.

The present Acting General Counsel has taken some important steps toward improving this situation. For example, there is now a system whereby the General Counsel can monitor the filing and subsequent prosecution of cases. The Acting General Counsel has also arranged for his staff to audit in depth the performance of some of the field legal units. I would hope to build upon what he has done. For example, if I were General Counsel, I would hope to meet with each Regional Attorney at least once every three months, to review each case on his or her docket in terms of what has been going on and what is planned for the immediate future. I would also require the Regional Attorneys to forward cases to the Commission for litigation authorization within a reasonably short time after conciliation fails.

I would also hope to improve the training given to the Commission's lawyers. There are some excellent advocacy training programs offered by the Department of Justice and by such organizations as the National Institute of Trial Advocacy. I would hope to offer the Commission's lawyers opportunities to

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attend such programs. I would also encourage experienced lawyers to work with new lawyers, to help them develop their skills.

These are just some of the administrative steps that the General Counsel could take to enhance the effectiveness of the Commission's enforcement efforts. Whatever such steps the General Counsel takes, however, he or she should always be trying to galvanize the legal staff -- to convey to them a sense of the critical role of litigation in the scheme of enforcing the antidiscrimination laws. If I am confirmed as General Counsel, I shall try always to imbue the legal staff with that sense of purpose.

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Question: I asked you this basic question during our private meeting, and again in much the same form, during the second hearing on your nomination to be General Counsel of the Equal Employment Opportunity Commission. I would appreciate having your written response to the same question.

If an employer with no history of ever hiring black employees (a 300 person work force with all whites), although they have applied and did possess the basic qualifications for employment (high school diploma or equivalent) -- is the object of a Commissioner's charge or a formal complaint which results in a finding of discrimination -- do you believe: (1) the Commission should require the employer to adopt goals and timetables to increase black employment in addition to making the complainant whole; or (2) the Commission should approve a voluntary affirmative action plan which the company proposes as a corrective measure to eliminate underrepresentation of blacks in the employer's workforce; or (3) the Commission should seek consent decrees or judicial orders which include goals and timetables to eliminate black employee underrepresentation and past discrimination, 'make whole' remedies for all victims of discrimination, and affirmative action initiatives to improve future minority employment opportunities.

Please answer yes or no and then provide any rationale or explanation for your answer. In instances in which your answer departs from existing Commission policy or existing federal court interpretations, please explain any reason for your difference with existing law or policy.

Answer: No. Under the circumstances described in the question, I would not be inclined to recommend to the Commission in all respects any of the three strategies for relief suggested in the question. Instead, I would recommend that the Commission seek a court order requiring the employer (1) to make whole all those who suffered discrimination at its hands; (2) not to discriminate in the future; (3) to keep the records necessary for the Commission to monitor its compliance with the injunction and with Title VII generally, and to make those records, its officers and its employees available to the Commission upon request; and (4) to take affirmative action to eliminate the practices, procedures or other factors that led to the past discrimination, and to ensure equal employment opportunity in the future. I shall elaborate upon each of these four elements of relief that I would propose to seek. */

* In answering this question, I am assuming that black workers constitute a significant portion of the relevant local labor force.

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First, we should ask the court to order that each and every person who suffered discrimination at the hands of the employer be "made whole," as nearly as possible, and as quickly as possible. The person should receive the wages he or she would have earned (with allowance for promotions the person would have received), the training the person would have received, placement in the job they would have held (with attendant seniority, pension rights and other benefits), and any other benefits, opportunities or privileges the person would have received or enjoyed but for the discrimination. In short, to the maximum extent possible, each person who suffered discrimination should end up in the condition he or she would have been in had the employer not discriminated against that person.

I wish to stress that when I refer to "each person who suffered discrimination," I do not mean only those who come to the EEOC and file a charge. The facts set out in the question indicate a situation where there has been a long-standing pattern or practice of discrimination. This suggests that there may be dozens or hundreds of blacks whose federal civil rights have been violated, and I think it is the responsibility of the EEOC to take affirmative steps to try to find them, not just to wait for them to come to us. I include among the victims we should try to find, and for whom we should seek relief, those who did not even apply for employment because they knew the employer would discriminate against them. Moreover, experience suggests that an employer discriminating against blacks along the lines described in the question was probably also discriminating against others on the basis of their national origin, sex or religion. This possibility should be investigated thoroughly, and if any such discrimination is found, its victims, too, should receive full personal relief.

The second and third elements of the relief I would urge the Commission to seek are an injunction against future discrimination by the employer; and a requirement that the employer keep specified records, and make them available to the Commission, in order to enable the Commission to monitor the employer's future compliance with the injunction and with Title VII generally. The order should also permit the EEOC to interview officers and employees of the employer. This type of relief is generally secured now. I understand, however, that there may not be follow-up to make sure that an employer complies with an order we secure against it. In effect, I have been told, injunctions are often placed on a shelf and never looked at again, unless some staff member has a personal interest in the matter, in which case compliance is monitored until that staff member transfers within or leaves the Commission.

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If I am confirmed as General Counsel, I would hope to establish a system for monitoring compliance with all the injunctions the Commission secures. By definition, we secure court-ordered relief only where we and the court (except where it is a consent decree) believe discrimination occurred, and the employer refused to agree to full relief without our taking it to court. Under these circumstances, there is always at least a reasonable chance that the employer will resume its unlawful ways if left to its own devices, and therefore we should revisit it periodically to make sure that it does not.

Furthermore, once an employer is subject to an injunction against discriminating, any discrimination by that employer would not only violate Title VII, but would also constitute contempt of court and therefore be subject to civil and criminal sanctions up to and including incarceration. As I testified, probably nothing would more effectively prompt those subject to Title VII to take the statute seriously than if an executive were sentenced to jail because of employment discrimination. Price-fixing among competitors was a federal crime under the Sherman Act from 1890, but corporate America first began to take the prohibition seriously, and to institute meaningful internal compliance programs, after some executives of General Electric and Westinghouse spent time in jail for price-fixing in the 1960's. Equally aggressive sanctions against those who discriminate would likely provoke meaningful internal compliance efforts by all covered entities. */

* I have also advocated more aggressive sanctions in other contexts at the Commission. For example, our staff recently received information indicating that a certain employer has been deliberately falsifying its EEO-1 Reports (forms required by law to be filed with the EEOC, showing the racial, sexual and national origin breakdown of the employer's work force). Our staff recommended that we file a suit against the employer, seeking a court order directing the employer to correct its EEO-1 Reports. I recommended to Chairman Thomas, however, that instead the staff should refer the matter to the local U.S. Attorney for a grand jury investigation, and that the Chairman should ask the Assistant Attorney General in charge of the Criminal Division of the Department of Justice to ask the U.S. Attorney to pursue the investigation expeditiously. Knowingly and willfully making a false statement to a federal agency is a crime (see 18 U.S.C. §1001), and we should treat it as such. Securing criminal sanctions against this offending employer would send a clear signal to all employers that they should take seriously their EEO-1 Reports.

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Finally, the court order should require affirmative action by the employer to eliminate the causes of the past discrimination, and to ensure equal employment opportunity in the future. The steps necessary to eliminate the causes of past discrimination may be as varied as the causes. Often, the problem is that the people making personnel decisions, or their supervisors, intentionally discriminate. In such situations, those people might be relieved of their personnel authority, or at least trained to overcome their prejudices. In other cases, the problem is a practice or procedure that was not designed to discriminate, but does so nonetheless. In those situations, the relief should prohibit the discriminating practices or procedures. */ Whatever the cause or basis of the discrimination, the relief should address it directly.

The affirmative action required should also be directed toward the employer's future behavior, and in this regard might be divided into internally- and externally-oriented requirements. The former might include requiring the employer to establish an internal EEO compliance system, with authority both to monitor the company's general compliance with the antidiscrimination laws and to address specific complaints of discrimination. The externally-oriented affirmative action should at least include requiring the employer to make all its employment opportunities known to the group(s) it previously excluded. It might also include requiring the employer to establish or expand training programs, both at the entry level and at higher levels (to prepare people for promotions), and with respect to all types of jobs, including managerial and executive positions. I also believe that as part of a company's affirmative action program it should reserve some training opportunities, and perhaps even some employment selections, for people who have not had an equal opportunity to secure training or experience. For example, depending upon the types of jobs the employer has, some opportunities might be reserved for people who dropped out of high school, or who went to schools where they received woefully inadequate educations, or who did not have an opportunity to attend college (or business school), or who are seeking to enter the labor force after a long absence from it. It is impossible to be precise about what affirmative action should

* The question implies (or at least I infer from it) that a high school diploma or equivalent is a valid qualification for employment at the employer in question. There are, however, situations in which this is not the case, and making a high school diploma or equivalent a qualification for employment would violate Title VII. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). In such a situation, it would be appropriate to enjoin the employer from requiring a high school diploma or equivalent as a qualification for employment.

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be required, because the details in any given situation will depend upon the nature of the employer and its work force, and the products it makes or services it provides. The general rule should be, however, for a previously discriminating employer to open up its training and hiring to all, to make sure that those it previously excluded are informed concerning the opportunities it offers, and to provide opportunities for those who have not had equal opportunity in the past.

None of the relief that I would propose to seek is contrary to existing Commission policy. Indeed, it cannot even be said to depart from existing Commission policy because there is no existing Commission policy concerning the relief to be sought in circumstances like those described in the question. My proposal is, however, and expansion of existing Commission practice in that it stresses (1) aggressively looking to find the victims of an employer's discrimination, (2) actively monitoring compliance with all injunctions, (3) seeking criminal sanctions for violations of injunctions, and (4) encouraging employers to set aside opportunities for people on the basis of their social or economic disadvantage.

Similarly, none of the relief that I would propose to seek violates existing federal court interpretations of Title VII. My proposal does not include, however, one type of relief that is suggested in the question and that has been sanctioned by federal courts of appeals: goals and timetables based upon race or sex or national origin. If I were General Counsel now, I would not propose that the Commission seek such relief because I believe that such relief (1) as it is often formulated, is barred by section 706(g) of the Civil Rights Act of 1964, (2) violates the fundamental principle underlying Title VII, and (3) is not necessary to secure or monitor compliance with Title VII.

Court orders requiring an employer to try to satisfy the "goal" of having "x" percent of its hires or workers come from "y" group often include some sanction, explicit or implicit, for a failure to meet the "goal." In such situations, while called a "goal," the target is really a quota. Such an order violates section 706(g) of the Civil Rights Act of 1964, as amended, which provides, in relevant part:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or discharged for any reason

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> other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

The legislative history of this provision explains that while a court should order an employer to hire those against whom it discriminated, the court may not order the employer to hire other people on the basis of their race, color, sex, religion or national origin. For example:

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay. . . . No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e) [enacted without change as the last sentence of section 706(g)], which makes clear what is implicit throughout the whole title; namely, that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin.

110 Cong. Rec. 6549 (remarks of Sen. Humphrey). The last sentence of section 706(g) was explained in virtually identical language in an interpretative memorandum by Senators Clark and Case, the "floor captains" for Title VII. Id. at 7214. Similarly:

> Under title VII, not even a court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title.

Id. at 14465 (Senate bipartisan civil rights newsletter).

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Furthermore, such an order runs contrary to both the Supreme Court's declaration of the general effect of Title VII -- "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) -- and the Court's interpretation of section 706(g) in Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984).

Even if a court-ordered "goal" did not require an employer to hire anyone on the basis of one of Title VII's prohibited factors, the order would still necessarily result in the employer's considering the race or sex or national origin of its applicants and employees. This inherently conflicts with the purpose of Title VII: "to make race irrelevant in the employment market." Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 709 (1978). Such a conflict might perhaps be acceptable if "goals and timetables" were necessary to monitor the employer's future compliance with Title VII, but they are not. Whatever workforce composition or hiring "goal" may be set in a court order, an employer's reaching the goal does not necessarily mean that the employer is not discriminating. Nor does a failure to meet the goal necessarily mean that the employer is discriminating. Either way, in order to know whether the employer is complying with Title VII, it is necessary to review the employer's actual personnel actions. Considering the inherent conflict between court-ordered "goals" and the principle underlying Title VII, and considering that the Commission has the resources to monitor actual compliance with Title VII by those against whom it secures injunctive relief, I would recommend to the Commission that it undertake to monitor those defendants' future personnel practices, without seeking court-ordered "goals."

The federal courts of appeals, both before and after the Stotts decision, have approved court-ordered "goals," even where they have amounted to quotas, as relief in Title VII litigation. None of those courts, however, has said that such relief must be sought. Therefore, not seeking such relief does not violate existing federal court interpretations of Title VII. Moreover, within the next two months the Supreme Court will probably rule on whether such relief may be ordered, and (if so) under what circumstances. If I were to be confirmed as General Counsel before the Supreme Court decides this issue, I would recommend that the Commission not seek such relief until the Supreme Court rules. Once the Supreme Court rules, I would recommend that the Commission seek relief in accordance with whatever the Supreme Court decides, regardless of whether I agree or disagree with the Court's decision.

Question: Recently the Commission, without any vote or public announcement, abandoned the use of 'goals and timetables' as a measure of relief in seeking settlements with private employers accused of discriminating on the basis of race, national origin, age or sex. It is my understanding that the Acting General Counsel of EEOC undertook this action on his own without any official sanction by the members of the Commission. Do you believe this action was legal or proper? What would you have done in this circumstance if you were the General Counsel? Do you agree with the unstated reason for this change in EEOC policy, i.e. providing a race-conscious remedy for a class of individuals who appear to be the victims of discrimination, despite the absence of specific proof of discrimination and the failure of the employer to provide a non-discriminatory, business-related explanation of the absence or underrepresentation of minorities or women? If so, state your reasons or the nature of your disagreement with this eliminaton of affirmative action 'goals and timetables' as a remedy for discrimination?

Answer: If I had been the General Counsel, I would have recommended to the Commission that it address the question of whether "goals and timetables" should be sought in court-ordered relief.

As should be clear from my answer to the previous question and my testimony before the Committee, I agree with the Acting General Counsel's conclusion that court-ordered "goals and timetables" should not be sought in Title VII litigation. My reasons for this, as I stated in my answer to the previous question, are (1) such relief, as it is often formulated, is precluded by section 706(g) of the Civil Rights Act of 1964; (2) such relief contradicts the fundamental purpose of Title VII, "to make race irrelevant in the labor market," Manhart, supra; and (3) such relief is neither necessary nor sufficient to monitor compliance with Title VII and ensure nondiscrimination in the future.

Moreover, I believe the Acting General Counsel's action was "legal" in that his directive did not violate any statute, court decision or express Commission policy, and was therefore technically within the scope of his "responsibility for the conduct of [the Commission's] litigation" under section 705(b)(1) of the Civil Rights Act of 1964, as amended.

Nonetheless, I would not have done what he did for three reasons. First, considering the importance and sensitivity of the issue, I think it would have been preferable for the five Commissioners to have addressed it as a body. I agree with the Acting General Counsel that a majority of the present Commissioners support his position. Indeed, a majority of them indicated such support recently in testimony before the

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Subcommittee on Employment Opportunities of the House Committee on Education and Labor. Had I been General Counsel, however, I would have asked the Commission to vote on the issue before I declared any policy with respect to "goals and timetables."

Second, had I been General Counsel, I would have recommended that any policy decision concerning the use of "goals and timetables" be announced publicly immediately after it was made. Chairman Thomas, in his overview to his 1985-86 regulatory program, stressed the agency's "responsiibility to explain the antidiscrimination laws to the public clearly, so that workers and employers can understand their rights and obligations." I wholeheartedly agree with this. The Commission exists to serve the public, and the public is entitled to know what we are doing, as we do it. */

Finally, had I been General Counsel, I would not have recommended that the Commission address "goals and timetables" in exclusively negative terms. The people who are depending upon the EEOC to protect and vindicate their civil rights should be told what we are going to do to secure those rights, not just what we cannot do. Indeed, even some of our own staff are confused, inferring incorrectly that the Commission opposes all court-ordered affirmative action. I would have recommended that the Commission issue a broad statement concerning the relief, including the affirmative action, that it would seek in class actions, and that the Commission explain in that statement why it would not seek "goals and timetables."

* I also believe that Congressional oversight committees, as the public's representatives, should be informed directly by the Commission concerning major policy decisions and directives.

Question: What are your views on sex-based wage discrimination? Please expand on your specific feeling about the role of the EEOC in vigorously enforcing The Equal Pay Act, indicating any places where you disagree with the current law as articulated by the EEOC or the federal courts.

Answer: Sex-based wage discrimination is morally repugnant to me, and is unlawful under Title VII and the Equal Pay Act.

I believe that the EEOC should (and can) be more vigorous in enforcing the Equal Pay Act. In general, I believe that whenever an individual secures relief through private litigation under one of the statutes we enforce, it is a sign that we are not adequately doing our job. As I explained in response to the first question, I am particularly concerned about the decline in cases filed by the Commission under the Equal Pay Act. The Equal Pay Act and the other statutes the EEOC enforces establish federal civil rights, and the American people are entitled to have the Federal Government protect and vindicate those rights.

The present Commission has taken a giant leap in the right direction. In the past, the Commission refused, as a matter of policy, to bring suit where discrimination occurred if it did not deem the discrimination to be "litigation-worthy." The present Commission has changed this policy, and has declared its intention to bring suit whenever and wherever discrimination occurs (unless, of course, the offender agrees to provide full relief without our having to file suit). In my opinion, it is wrong for the Federal Government deliberately to ignore violations of individuals' federal civil rights where the responsible Government agency has the resources (as the EEOC does) to seek vindication of those rights.

If confirmed as General Counsel, I would try to find the reasons for the recent decline in Equal Pay Act case filings by the Commission, and correct the problems underlying it. I would bring litigation whenever the Commission found a violation of the Equal Pay Act.

I explained at the Committee's April 9, 1986, hearing on my nomination the one respect in which I "disagree with the current law [interpreting the Equal Pay Act] as articulated by the EEOC or the federal courts." As I testified, I read the Equal Pay Act and its legislative history as saying it is a violation if a man and a woman are paid different wages for doing the same work at the same time. The courts and the EEOC, however, have interpreted the statute to prohibit unequal wages for equal work even when the man and woman only succeed

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one another. As I testified, if I am confirmed as General Counsel, I shall enforce the Act in accordance with the Commission's and the courts' interpretation. */

* In response to written questions from Senator Weicker, I have explained my disagreement with the way some courts of appeals have interpreted the word "establishment" as it is used in the Equal Pay Act. I do not, however, "disagree with the current law as articulated by the EEOC or the federal courts," because I agree with the Commission's interpretation as expressed in the regulations it approved on April 21, 1986, and I agree with the interpretation of the Supreme Court and a number of lower courts.

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Question: It is my understanding that the EEOC is currently considering revisions to the Uniform Guidelines on Employee Selection Procedures. Do you see anything wrong with those guidelines? What changes do you believe should be made in order to improve enforcement?

Answer: In June 1984 (two months before I came to the EEOC) the Commission voted unanimously to change the recordkeeping requirements of the Uniform Guidelines on Employees Selection Procedures. In July 1984 the Commission voted unanimously to review the substantive aspects of the Guidelines. That review is now in progress, but no specific substantive changes have yet been proposed.

There are three respects in which I believe the Guidelines should be revised. First, as the General Accounting Office has observed, the Guidelines are very difficult to understand. Uniform Guidelines on Employee Selection Procedures Should Be Reviewed and Revised, GAO/FPCD-82-86, at 10-11 (July 30, 1982). I agree with the GAO's recommendation that the Guidelines should be made "more understandable to their users." Id. at 18.

Second, section 4C of the Guidelines provides, in part:

> If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multi-part selection procedure or any separate procedure that is used as an alternative method of selection.

In Connecticut v. Teal, 457 U.S. 440 (1982), the Supreme Court held that even though there was no adverse impact apparent in the employer's overall selection process -- i.e., the employer's "bottom-line" indicated no disparity in overall selection rates -- the adverse impact of an examination used as a pass-fail barrier in the course of the selection process established a prima facie case of discrimination in violation of Title VII. I believe the Federal enforcement agencies should take enforcement action whenever any part of an employer's selection process

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violates Title VII, and therefore I believe that section 4C of the Guidelines should be revised to eliminate the "bottom-line" restriction on the Commission's enforcement intentions.

Third, section 3B of the Guidelines requires that an employer include as part of any validity study "an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible . . . ." In Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), however, the Supreme Court held that once an employer shows that its tests are "job related," the burden is upon the complaining party "to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" Section 3B should be revised to conform with the Supreme Court's ruling in Albemarle.

Beyond these three changes that I believe definitely should be made, there are a number of aspects of the Guidelines that should be reviewed carefully. For example:

1. The Guidelines define adverse impact on the basis of an 80% rule: whenever the selection rate of one group is less than 80% of the selection rate of another group, a prima facie case of discrimination in violation of Title VII is established. Thus, for example, if an employer hires 40 of 100 white applicants, and 30 of 100 black applicants, its selection process is deemed to be unlawfully discriminatory, unless its selection procedures have been "validated" or it eliminates the adverse impact (e.g., by hiring another two of the black applicants). The courts gererally have not employed such a rigid, mechanical, statistical test to define adverse impact. I think careful attention should be given to the question of whether the 80% rule is appropriate, as opposed, for example, to a rule that would look at whether there is any statistical significance to a particular disparity in hiring rates. If the 80% rule is the best test, it should be retained; if there is something better, it should be adopted.

2. The Supreme Court has only applied disparate impact analysis to objective hiring standards, such as an examination, a high school diploma requirement, and height and weight criteria. Lower courts disagree over whether, and if so how, to apply the disparate impact theory where an employer bases its hiring on other types of criteria. The Guidelines apply the 80% rule to every selection process. I think the Commission should review the conflicting opinions of the courts of appeals, and consider what approach correctly applies the law as intended by Congress.

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3. The Guidelines establish technical standards for the validity studies necessary to justify using a selection process that has disparate impact. Section 5C of the Guidelines states:

> The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, D.C., 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

Several professional organizations, however, including the American Psychological Association, the American Society of Personnel Administration and the International Personnel Management Association, have criticized some of the technical aspects of the Guidelines as not being consistent with the current state of research and theory in psychological testing. This, too, needs to be investigated.

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Question: What is wrong with using statistical proof to identify the possibility of the existence of discrimination and to initiate an appropriate investigation, or to fashion a remedy when discrimination is found?

Answer: There is nothing wrong with using statistical evidence to identify the possibility of the existence of discrimination and to initiate an appropriate investigation. However, when it comes to fashioning a remedy after discrimination is found, statistical methods have too often been unfair to the victims of discrimination, and overly generous to offenders.

In cases alleging discrimination against a class of people, the trial is often divided into two phases: the liability phase, after which the court rules as to whether the defendant has violated the law; and the relief phase, after which the courts orders whatever relief it deems appropriate. In determining what relief -- particularly back pay -- should be awarded to those who suffered the discrimination, courts often rely upon two "statistical" assumptions: (1) the number of people the defendant hired or admitted to membership is the number it would have hired or admitted but for the discrimination; and (2) but for the discrimination, people from the plaintiff class would have been hired or admitted at the same rate as they applied or at which they participate in the relevant local labor market. Based upon these assumptions, courts calculate the number of persons from the plaintiff class who would have been hired or admitted, multiply that number by the back pay for each position, and make this the total amount of backpay relief to be distributed among the members of the class.

As a result of this method of setting the total backpay award for the plaintiff class, often no member of the class secures full relief. It is frequently impossible to determine who exactly would have been selected for any particular position, and so two or more individuals are made to share the backpay award for a single position.

I have serious reservations about this approach, and if I am confirmed as General Counsel, I shall recommend to the Commission that it urge courts to change this approach in order to secure justice for those who suffer discrimination. It is argued that it would be unfair to require an employer to pay more than one backpay award for any one time it filled a position. In my opinion, a higher principle is that each person who suffers discrimination should receive full relief, including full back pay. To the extent there is doubt about who would have been hired or admitted absent discrimination, I think the doubt should be resolved against the defendant, even if this means that more people receive back pay than would have been hired or admitted absent discrimination. The defendant could have avoided this extra burden by complying with the law in the first place. Having violated the law, the defendant should not be entitled to the benefit of any doubts.

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Senator METZENBAUM. But because you reject all goals, and you rejected this settlement, that case will go on for years, and no one will get any relief for years.

So what you are doing in effect, after the settlement was made and agreed to, you then send the Chairman a flippant memo, a kind of which I have never before seen in my lifetime, and then you get the matter unresolved—it is resolved, but you get it unresolved, make a lofty speech about your concern, but meanwhile, when my colleagues ask you questions of when did you ever move in connection with any particular area, you say, "Well, I do not think I ever did; there are none that I did."

What concerns all of us, Mr. Zuckerman, is that you are magnificent with the words, and you are great with the legal theory, but the people who need assistance from the EEOC and have a right to assistance under the law will not get it because of your lack of advocacy, but rather, your great ability to obfuscate the issues with legalisms.

Mr. ZUCKERMAN. Senator, with all due respect, I must say that the basic point in this memo is that the people who suffer discrimination are entitled to get relief. The problem with the proposed settlement was that the people who suffered the discrimination, if discrimination had occurred, were to get zero, nothing, absolutely nothing. Assuming the charge was true—bear in mind it had not yet been determined—but based on that charge, then there were real people out there, and lots of them, not just one or two, but lots of people who had suffered discrimination, who had not been hired because of their race, because of their national origin, because of their sex. What the staff was proposing would have done nothing for them.

Senator, you have a good point that it takes a long time in litigation. And one of the things that I would hope to do, Senator, is to make it move a little faster—not just a little faster, but a lot faster—because as I have said, delay works against the people who have suffered discrimination. They are entitled to faster relief. They are entitled to have us work harder. They are entitled to have us do more for them.

That is where I say we have the resources to do more. There is no reason to settle for nothing for the people who suffer discrimination. We should be insisting upon full relief. The Commission has adopted a policy of insisting upon full relief. I would enforce that policy as best as I could if I were confirmed as general counsel.

Senator METZENBAUM. Let me read you this statement by Acting General Counsel Johnny Butler which appeared in the Chronicle on Higher Education on January 29, 1986.

> Until the Supreme Court resolves the three affirmative action cases pending before it, the EEOC is not seeking court enforcement of conciliation agreements or consent decrees that involve numerical goals and timetables.

Do you agree with Mr. Butler's position, and do you believe it is lawful?

Mr. ZUCKERMAN. I disagree with the notion that any court order should not be enforced. A court order must be enforced, a court order must be obeyed, unless and until the order is changed by the

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court. And anyone who violates a court order, to my mind, is in contempt of the court.

Senator METZENBAUM. So you disagree with Mr. Butler?

Mr. ZUCKERMAN. Yes, sir, on that.

Senator METZENBAUM. And what would you do differently?

Mr. ZUCKERMAN. Where a company violates a court order, I would seek to have it adjudged in contempt.

Senator METZENBAUM. What would you do to change a consent decree if you disagreed with it?

Mr. ZUCKERMAN. I have no intention to go looking through the consent decrees of the past to see if I agree or disagree with them. As I have said, we have the resources to do a lot more than we are doing now, but that is not something that I have the intention to do.

Senator METZENBAUM. In document No. 61 of your committee submission dated July 26, 1985, you opposed the general counsel's request to intervene and enforce a title VII settlement requiring that an employer, quote, "make a good faith effort to renew, promote and tenure female faculty at the same rates as male faculty."

Even though you agreed that the employer violated the terms of the settlement agreement, you opposed the intervention because, in your words, quote, "I question the enforceability of this settlement's quota approach."

Was the EEOC a party to that settlement?

Mr. ZUCKERMAN. As I recall, no.

Senator METZENBAUM. Then, how can you as a lawyer refuse to help enforce the law because you do not like the terms of a court-approved settlement agreement? You just told me you would enforce a court-approved settlement agreement.

Mr. ZUCKERMAN. The EEOC was not a party to this case.

Senator METZENBAUM. OK.

Mr. ZUCKERMAN. I am not sure whether it was a court approved agreement. I am not sure that this was a court order.

Senator METZENBAUM. If it were, would you refuse to help enforce it?

Mr. ZUCKERMAN. If it were a private party's litigation, the question of whether to intervene in any private litigation presents a whole different set of considerations. I would not rule it out. I would not say automatically that I would intervene, or propose to the Commission to intervene in all private actions.

Senator METZENBAUM. But in your words, you would question the enforceability of this settlement because you questioned the settlement's quota approach.

Mr. ZUCKERMAN. What I said is I questioned the enforceability of this settlement's quota approach.

Senator METZENBAUM. That is right.

Mr. ZUCKERMAN. That is where you have a question. As I am reading this, I remember that this was not—and I can tell from the "general public importance" reference, and from the reference to "intervention"—a case in which the EEOC was a party. If this is not a court order, but an out-of-court settlement—even if it is a settlement approved by a court, but not made part of a court order—in which the parties have agreed to have equal rate hiring; and the respondent refuses or fails to do so; and now the plaintiff comes in

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and says to the court, "Well, we had agreed out of court that they would hire at the same rate," which in and of itself can be discrimination, would a court enforce that agreement between the plaintiff and the defendant for the defendant to discriminate on the basis of sex? I question the enforceability of an out-of-court settlement along those lines.

Senator METZENBAUM. Mr. Zuckerman, does it concern you that all the civil rights groups and all the senior citizens groups are opposing your confirmation—and if I am wrong about that, please correct me, because that is my understanding. Does that not concern you about the right of the public to have somebody in that position who, whether rightly or wrongly, but at least perceptibly, is not going to give the kind of evenhanded and vigorous approach to enforcement of the law that those who are most concerned about it would hope for?

Does that bother you?

Mr. ZUCKERMAN. First, Senator, I believe that the Anti-Defamation League has supported me; the Cuban American National Foundation——

Senator METZENBAUM. Who?

Mr. ZUCKERMAN. The Cuban-American National Foundation; the American G.I. Forum, have all supported me, and have sent letters to the committee, urging that I be confirmed.

Senator METZENBAUM. We have not seen any such letters. I do not know if the chairman has. Have you——

Senator NICKLES. For the Senator's information, I think some letters are part of the record, and we will make sure that you have copies of them.

Senator METZENBAUM. All the letters that the chairman spoke about originally, have they been made a part of the record?

STAFF. We did that this morning.

Senator METZENBAUM. You did that. If we have any additional ones that have not been included, I would ask unanimous consent that they be included as well.

Senator NICKLES. Certainly.

Mr. ZUCKERMAN. May I continue, though?

Senator METZENBAUM. Certainly.

Mr. ZUCKERMAN. I appreciate their support, and I feel privileged that they do support me.

But yes, Senator, it does bother me that other groups do not support me, that other groups who have long fought for civil rights, like the groups supporting me have, that other groups have urged that I not be confirmed.

Look at the reasons given, and the reasons consistently become that I oppose the use of preferences on the basis of prohibited factors as relief in title VII litigation, and that they somehow infer from my opposition to quotas that I would not enforce the law.

Senator, what I have tried to make clear as best as I can—and perhaps my greatest disappointment is that I do not seem to be able to make this clear to some—is that I oppose quotas; I oppose the use of preferences on the basis of prohibited factors; I oppose requiring employers to consider prohibited factors, precisely because of my unwaivering, unstinting commitment to the fundamental principle underlying title VII.

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I oppose that type of relief precisely because it is contrary to the fundamental principle of title VII, that race, color, sex, religion, and national origin are irrelevant to the employment process and should not be considered by an emloyer at any point in the employment process. These groups have opposed me because of my position on that issue. As I said last time, it is a fundamental disagreement.

With respect to the American Association of Retired Persons, and as I pointed out at the beginning of today's hearing in response to questions by the chairman, in opposing me they cite facts which simply are not facts. It is a great disappointment to me because they alone of all the groups that have written to oppose me called me to say they were going to be sending a letter, and told me the reasons that they were going to give. I pointed out to the person who called me the mistakes with respect to these facts and he was quite surprised. He had not realized that I had not been responsible for drafting the pension benefit accrual regulations. He was not aware that the apprenticeship regulations had been drafted and sent to OMB before I had ever set foot through the Commission's door. He said, "Oh, I did not realize that. I am going to go and check with other people back at the AARP about whether we are still going to send the letter, and I will get back to you."

The next thing, a couple of hours later, I received a copy of the letter that they sent, that still contained those factual misstatements.

Yes, Senator, it really does bother me that these groups somehow have inferred from my opposition to quotas that I will not enforce the statute. To me, Senator, it is precisely because of my commitment to this statute, to all that it stands for, to the importance of this statute, to the potential of this statute to make opportunities available; it is for all those reasons that I oppose the use of quotas in the name of enforcing the statute.

Senator METZENBAUM. Mr. Zuckerman, I sometimes feel that when the entire army is out-of-step and only you are in-step, maybe you had better sort of check yourself out a little bit. When you talk about your great dedication to the program, I would have to say to you that I think you also have to think about the fact that if the public perception of those who are most interested in enforcing the law varies with what you consider to be the reality, then in those instances, probably, the public perception becomes that much more relevant, unless you can change it.

Mr. ZUCKERMAN. In terms of the public perception.

Senator METZENBAUM. We have more opposition, I think, to you than I recollect in connection with almost anybody who has been up for confirmation in a long time. It comes from very respectable and responsible groups.

Let me proceed. I want to read you a statement from Assistant Attorney General Bradford Reynolds. If you wish, I will show you a copy of the statement so you have it clearly fixed in your mind.

Senator NICKLES [presiding]. Senator Metzenbaum, before you get started on another round, is it your intention to proceed forward for a substantial period of time?

Senator METZENBAUM. Well, I hope to be done—I will certainly be done before noon, and I hope to be done before that.

Senator NICKLES. I appreciate that. It is necessary for me to leave, and I will leave, and if you would just conclude the hearing at the end.

Mr. Zuckerman has been before this committee for a long period of time. We appreciate your appearance and patience. I know it has been difficult for you and your family and others. I think this is the third day of hearings. Given the committee's agenda and the things that are going on on the floor, it has been a substantial ordeal, I am sure for you as well.

We will ask that if other members have additional questions—and I think we heard Senator Simon and Senator Kerry both mention the possibility that they wanted to submit additional questions—we would appreciate your response to those as well.

Senator Metzenbaum, if you would conclude the hearing, I would appreciate it.

Senator METZENBAUM. Thank you, Mr. Chairman.

Senator NICKLES. Thank you.

Mr. ZUCKERMAN. Thank you, Senator Nickles.

Senator Metzenbaum [presiding]. I think I told you I was about to read Bradford Reynolds 'statement in which he said:

> I do not believe that the government should resort to the use of quotas, goals, or timetables in developing internal policy in its advocacy role before courts or administrative tribunals or in commenting upon existing or proposed legislation.
>
> Furthermore, to the extent that the Uniform Guidelines Executive Order 11246 or any other government rules or regulations employ affirmative action, either without a prior determination of purposeful discrimination or to confer benefits on persons who are not proven victims of intentional discrimination, I urge that they be revised to reflect the views delineated above.

Do you know the statement?

Mr. ZUCKERMAN. No; I am not familiar with the statement.

Senator METZENBAUM. I think it is only fair that you be familiar with it.

[Staff handing document to Mr. Zuckerman.].

Mr. ZUCKERMAN. Obviously, Senator, I have just been given this piece, and the staff just explained that this is a part of a larger statement, so I do not know the context of this.

But I would certainly say that government agencies should be expected and required to engage in affirmative action, even if they have not engaged in discrimination. I think that is required by title VII.

I think we should be encouraging all employers, whether they have discriminated in the past or not, to engage in affirmative action.

Senator METZENBAUM. Well, that is not my question. You have a great ability to give a longer answer and not to answer the question.

My question to you is do you agree with the legal position set forth by Assistant Attorney General Reynolds, and if you do not, is there any part of Mr. Reynolds' position to which you do not subscribe?

Mr. ZUCKERMAN. Well, I have a problem with this statement.

Senator METZENBAUM. All you have got to do is answer "Yes" or "No." Do you agree or disagree?

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Mr. ZUCKERMAN. I disagree with a substantial parts of what is said here. It is also contrary to the position taken by the EEOC and by the Department of Justice in the Supreme Court, in the *Sheet Metal Workers* case. Assistant Attorney General Reynolds, I believe, is one of the persons who signed that brief. That is why I have trouble dealing with his statement. It just is not consistent with other things that have been submitted.

That is why I am saying I disagree——

Senator METZENBAUM. OK. If you disagree with it, that is fine; you have a right to do that. You have a right to agree.

Mr. ZUCKERMAN. That is why I said I disagree with parts of this.

Senator METZENBAUM. OK. The Equal Pay Act prohibits an employer from paying a man and a woman unequally for equal work; is that right?

Mr. ZUCKERMAN. That is right.

Senator METZENBAUM. If a female makes less than her male predecessor or her male successor in the same job, do you believe the act permits a comparison of their work and pay to determine whether a violation has occurred?

Mr. ZUCKERMAN [pause]. I have questions about that.

Senator METZENBAUM. Then, do you believe that the act does or does not permit a comparison of their work and pay to determine whether a violation has occurred? It is "Yes" or "No."

Mr. ZUCKERMAN. As I understand the statute, the people should be doing the same job at the same time.

Senator METZENBAUM. Therefore, does it therefore follow that if the female makes less than her predecessor, or her male successor, that the act does not permit a comparison of their wages?

Mr. ZUCKERMAN. As I see it, that is more appropriately to be considered as a question of sex discrimination under title VII.

Senator METZENBAUM. But not under the Equal Pay Act?

Mr. ZUCKERMAN. That is how I would read the Equal Pay Act. The courts, however, have permitted those types of comparisons in some circumstances.

Senator METZENBAUM. How would you handle it? Would you permit the comparison under the Equal Pay Act, or did you just indicated to me a moment ago that you would not permit it?

Mr. ZUCKERMAN. I gave my view that I find that approach by the courts to be inconsistent with the language of the statute and inconsistent with the legislative history of the statute. The courts have followed that approach. The Commission has tended to follow that approach. That is my understanding of the way it will be enforced.

Senator METZENBAUM. Have you ever taken the position that the Equal Pay Act does not allow for a comparison of jobs if those jobs are not held at the same time by a man and a woman?

Mr. ZUCKERMAN. I am sure—that has been my interpretation of the statute, so I am sure I have said that, yes.

Senator METZENBAUM. Have you ever recommended the Commission reject litigation based on the argument that simultaneous empoyment of a man and woman in the same job is required under the Equal Pay Act?

Mr. ZUCKERMAN. I suspect that I have.

Senator METZENBAUM. Can you tell us the case? Do you remember any?

Mr. ZUCKERMAN. No; that is the only reason I say I suspect that I have. I might have, Senator. I mean, if you have the memo where I did that, I might have.

Senator METZENBAUM. But that is your opinion?

Mr. ZUCKERMAN. It is my opinion, as I read the statute, as I read the legislative history, that it talks in terms of if a man and a woman are doing the same work and being paid unequally, that that is the violation, and not if a man was being paid at one point and a woman at a different point.

Senator METZENBAUM. Your point is they have to be working at the same time, so if one is working before the other, there is no violation. So a man can be getting $8 an hour, and if a woman comes on and does the same job and gets $4 an hour, that is not discrimination because under the——

Mr. ZUCKERMAN. Oh, no, sir. That may be discrimination under title VII. But that is not what the Equal Pay Act addresses. The Equal Pay Act, as I read it, addresses where a man and a woman are working on the job at the same time.

Senator METZENBAUM. Do you agree with the current Department of Labor regulations and with the proposed EEOC regulations on this issue, which apply the Equal Pay Act to jobs filled by only one person, both where a predecessor male is paid more than a successor female, and where a successor male is paid more than a predecessor female?

Mr. ZUCKERMAN. I have already indicated that, as I view it, that the violation of the Equal Pay Act is where a man and woman are doing the same work at the same time and being paid differently.

Senator METZENBAUM. Does it bother you that eight courts of appeals and the majority and dissent in the *Gunther* case all disagree with your point of view, and they say that an Equal Pay Act violation can be established for a job that is not held by a man and woman at the same time?

Mr. ZUCKERMAN. I do not think the majority said that. As I recall, the dissent——

Senator METZENBAUM. How about eight courts of appeals; does that bother you?

Mr. ZUCKERMAN. Well, can I just finish. In on the Supreme Court, the dissent offered as a reason why the majority opinion in *Gunther* was wrong, the dissenters' view that this "constructive comparator" approach is valid. The majority did not endorse the constructive comparator approach, the majority in *Gunther.*

Senator METZENBAUM. It did not disagree with it. The majority did not address itself to that issue; the dissent did address itself to the issue.

Mr. ZUCKERMAN. OK. I am just saying the majority—I thought that in your original question, the suggestion was that the majority had endorsed that position.

Senator METZENBAUM. No; you are correct in that. That is correct.

Mr. ZUCKERMAN. OK, OK. But they did not.

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Senator METZENBAUM. Will you as general counsel enforce the act consistent with the regulations and the unanimous appellate court authorities referred to above, or on the basis of Zuckerman?

You will recollect that we started off this hearing with you telling me that you did not care about what three circuit courts of appeals did; that is not the law of the country, that you are Zuckerman, on another point. Now we have got eight circuit courts of appeals against Zuckerman. I am asking you what will you enforce?

Mr. ZUCKERMAN. Senator, with all due respect, I do not think that is a fair characterization of the first day of testimony.

Senator METZENBAUM. It sure is a fair characterization. You even used that language, Mr. Zuckerman. It is sure a fair characterization.

Mr. ZUCKERMAN. On this, I think the law is well-settled. This is the Commission's approach, and I would enforce it.

Senator METZENBAUM. I would like to follow up on your written answers to Senator Weicker's questions.

As you know, the Equal Pay Act prohibits unequal pay for equal work performed by men and women within the same establishment.

In your response to questions 5 and 6 from Senator Weicker, you conclude that under the Equal Pay Act, an "establishment" means a separate place of business. You also state that the EEOC regulation proposed in 1981 which would allow two or more physically separate locations to be considered as a single establishment in some cases is incorrect as a matter of law. Thus, in your view, Congress did not intend that the Equal Pay Act would reach the situation where male clerks in one branch of a department store are paid more than female clerks in another branch, doing the same work, or where male teachers in one school make more money than female teachers elsewhere in the same school district.

Is that a fair statement of your position?

Mr. ZUCKERMAN. This is where the Supreme Court has ruled on the definition of an establishment for purposes of the Fair Labor Standards Act. That definition applies to the Equal Pay Act, and that definition is incorporated in the existing regulations, and that to my mind is the correct interpretation as a matter of law.

Senator METZENBAUM. Mr. Zuckerman, you add that because title VII prohibits wage discrimination between an employer's male and female employees who work in different locations, "It is not necessary to change the definition of 'establishment' for Equal Pay Act purposes." End of quote.

Are you aware that the prohibitions of title VII do not apply to small employers with less than 15 employees?

Mr. ZUCKERMAN. Yes, sir; I am looking for——

Senator METZENBAUM. That would leave 15 million employees without any recourse.

Mr. ZUCKERMAN. I am looking for where I made that point. [Perusing documents.]

Senator METZENBAUM. Where you made it? Page 9, at the bottom of the page.

I once again stress, however, that it is not necessary to change the definition of "establishment" for Equal Pay purposes in order to reach and proscribe sex-based

wage discrimination where the male and female employees work in different locations.

Mr. ZUCKERMAN. You are right, Senator.

Senator METZENBAUM. That would leave 15 million employees of small businesses high and dry with no recourse.

Mr. ZUCKERMAN. Well, that, of course, is a congressional decision in terms of the applicability of title VII. Title VII does not cover those small businesses. But you are right, those individuals would not have recourse under title VII if they are in different establishments.

Senator METZENBAUM. Thank you, Mr. Zuckerman.

Mr. ZUCKERMAN. Thank you, Senator.

Senator METZENBAUM. I have some additional questions that I will submit to you in writing. I think some other members of the committee will do likewise.

[Additional material supplied for the record follows:]

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Nathan Perlmutter
National Director

823 United Nations Plaza
New York, N.Y. 10017
(212) 490-2525

April 16, 1986

The Honorable Orrin Hatch
United States Senate
SR-135
Washington, DC 20510

Dear Senator Hatch:

As a member of the Labor and Human Resources Committee, you recently received a letter from the Leadership Conference on Civil Rights opposing the nomination of Jeffrey Zuckerman to be General Counsel of the Equal Employment Opportunity Commission. This is to advise you that the Anti-Defamation League of B'nai B'rith, which has played a leading role in the Leadership Conference since its creation in 1950, dissents from the Conference's position on the Zuckerman nomination. We do so because, contrary to the Leadership Conference, we believe that Mr. Zuckerman is committed to true equality of opportunity and that he possesses the academic and professional qualifications which make him well-suited for the General Counsel post.

Much of the opposition to Mr. Zuckerman's nomination stems from the fact that he rejects the use of quotas and other numerical devices as affirmative action remedies. We are in complete agreement with Mr. Zuckerman on this score because the use of such quotas and goals subverts the guarantee of equal opportunity.

We urge you, therefore, to act favorably on the nomination.

Sincerely yours,

Nathan Perlmutter
National Director

NP:bl

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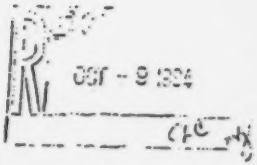
October 5, 1984



MEMORANDUM

TO : Constance Dupre
Legal Counsel

FROM : Clarence Thomas
Chairman

SUBJECT: The Age Discrimination in Employment Act

I am troubled by your Office's apparent failure (1) to consider the substantive implications of the Supreme Court's decision in United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977), in your analyses of the ADEA's requirements with respect to pension benefit accruals and early retirement incentives, and (2) to focus upon a key provision of ERISA in your analysis of the relationship between that statute and the ADEA with respect to pension benefit accruals.

In McMann, the Court held that a retirement plan that mandated retirement at age 60 did not violate the ADEA because, in the words of section 4(f)(2) of the Act,

> "It shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act . . . ."

If it was permissible under the ADEA, in 1977, for a retirement plan to mandate retirement at age 60, was it then also permissible for a retirement plan to provide that benefits would not continue to accrue if an employee continued to work past that age, or for such a plan to provide incentives for retirement at age 60?

To the extent that the answer to this question is yes, the issue becomes whether the 1978 amendment of section 4(f)(2) affected the lawfulness of early cessation of pension benefit accruals, or of early retirement incentives. That amendment provides:

> "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [between the ages of 40 and 70] because of the age of such individual."

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Does the cessation of pension benefit accruals before age 70 "require or permit the involuntary retirement of any individual"? Does the offer of early retirement incentives do so? Is the legislative history of the 1978 ADEA amendments relevant to the determination of the lawfulness of early cessation of pension benefit accruals or of early retirement incentives if such provisions were lawful under McMann? Are the questions that should properly be asked about any particular plan under which pension benefit accruals cease before age 70, or early retirement incentives are offered, (1) whether it is a "bona fide employee benefit plan," and (2) whether it is "a subterfuge to evade the purposes" of the ADEA; and, if so, what are, or should be, the proper standards for answering those questions?

Furthermore, with respect to pension benefit accruals, your analysis of the implications of ERISA did not consider a key relevant provision of that statute. ERISA establishes three tests for determining whether any particular retirement plan satisfies the fundamental ERISA requirement that every plan participant accrue each year some portion of his "normal retirement benefit" (i.e., the anticipated benefit at "normal retirement age"). 26 U.S.C. §411(b)(1). One of these rules -- the "fractional rule," 26 U.S.C. §411(b)(1)(C) -- sanctions plans in which each participant's accrued benefit is not less than the normal retirement benefit multiplied by a fraction (not to exceed one) whose nominator is the number of years the individual has participated in the plan, and whose denominator is the total number of years the individual will have participated at normal retirement age. The definition in ERISA of "normal retirement age" clearly anticipates that it may be an age below 65. 26 U.S.C. §411(a)(8). Does section 411(b)(1)(C) thus contemplate and sanction defined benefit plans in which there will be no further accrual of benefits after an age lower than 65? If so, if Congress rendered such plans unlawful by enacting the ADEA in 1967, what is the effect or significance, if any, of its expressly sanctioning them in ERISA in 1974?

My questions are not intended to be exhaustive, but should be taken, instead, as indicating the depth and scope of my concern about the adequacy of your Office's past legal analysis of the ADEA. Please prepare and submit to me, and to each of the other Commissioners, by COB Monday, October 15, a memorandum addressing these matters. And please be sure to indicate why the substantive implications of McMann, section 411(b)(1)(C) of the Internal Revenue Code, and such cases as Alford v. City of Lubbock, 27 FEP Cases 1075 (5th Cir. 1982), and Patterson v. Independent School District, 35 FEP Cases 1236 (8th Cir. 1984), were not discussed in your recent memoranda concerning the ADEA.

cc: Commissioners

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MEMORANDUM

TO: Clarence Thomas
Chairman

FROM: Constance L. Dupre
Legal Counsel

SUBJECT: Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 et seq., "ADEA."

This is in reply to your memorandum dated October 5, 1984, and received October 10, concerning this office's legal analysis on issues arising under the ADEA. Briefly summarized, your memorandum questions whether in developing our legal analyses on the issues of post-normal retirement age pension contributions and early retirement incentives we neglected to consider (1) "the substantive implications of the Supreme Court's decision in United Airlines, Inc. v. McMann," 434 U.S. 192 (1977); (2) "a key provision of ERISA"; and (3) certain court cases. We trust that this response will allay your concerns.

McMann

On McMann, the following discussion summarizes information previously provided to the Commission in greater detail.

In my memorandum to the Commission dated April 30, 1984, the applicability of McMann was discussed in the context of the weight to be accorded to legislative observations accompanying the 1978 amendments to the ADEA. See Memorandum, Dupre to Commission, Pension Benefits at Normal Retirement Age, at p. 30. Appended to that memorandum was a more complete discussion and analysis of that same issue done several years earlier. Id. Exhibit A at 9-11. By supplemental memorandum dated May 25, 1984, we responded to SCEP's instructions by analyzing the divergent positions taken by former General Counsels Clark and Connelly on the effect of the 1978 legislative history, an analysis that turned on McMann and Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). Neither of our most recent memoranda specifically addressed the substantive implications of McMann for the meaning of

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Section 4(f)(2) because it had consistently been the position of the Office of General Counsel and the Commission took the position in its litigation that McMann retained no applicability in that respect.

The relevance of the Supreme Court's decision in United Air Lines, Inc. v. McMann was first considered as part of the Commission's 1979 substantive review of the "special rules" regarding pension contributions and crediting. In McMann the Supreme Court held that pension plan provisions which permitted involuntary retirement and which pre-dated the ADEA could not be a "subterfuge" to evade the purposes of the Act as that term is used in Section 4(f)(2), 29 U.S.C. §623(f)(2). The Supreme Court's decision in McMann reversed the holding of the Fourth Circuit which stated that "in order to escape condemnation as a 'subterfuge,' an early retirement provision must have some economic or business purpose other than arbitrary age discrimination." McMann v. United Air Lines, Inc., 542 F.2d 217, 221 (4th Cir. 1976). In late 1977, prior to the Supreme Court's decision in McMann, Congress had taken steps to resolve the conflict among the circuits on the issue of involuntary retirement. 1/ Congressional efforts resulted in the 1978 amendments to the ADEA which overturned McMann by amending the ADEA to include an express prohibition on involuntary retirement.

In light of that sequence of judicial and legislative events, General Counsel Clark concluded that McMann had no applicability to the interpretation of Section 4(f)(2) following the 1978 amendments. Indeed, the Senate Report that accompanied H.R. 5383, submitted prior to the Supreme Court's decision in McMann, specifically rejected the Zinger and Taft decisions while endorsing the conclusion reached by the Fourth Circuit in McMann. The report stated:

> The third and fifth circuits have ruled that a pension plan which requires mandatory retirement prior to age 65 does not violate the act, because such a provision is sanctioned by section 4(f)(2). Zinger v. Blanchette, 549 F.2d 901 (3rd Cir. 1977); Brennan v. Taft Broadcasting, 500 F.2d 212 (5th Cir. 1974).
>
> The Taft court found the language of the section unambiguous and refused to consider the legislative

1/ In Zinger v. Blanchette, 549 F.2d 901 (3rd Cir. 1977) and Brennan v. Taft Broadcasting, 500 F.2d 212 (5th Cir. 1974) the Third and Fifth Circuits concluded that involuntary retirements were permissible under Section 4(f)(2).

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history. It concluded, erroneously in the committee's view, that a plan could not be a subterfuge within the meaning of section 4(f)(2) if it was operative before the effective date of the act. In Zinger, the third circuit distinguished between discharge and mandatory retirement on a pension, in ruling against a plaintiff who had been mandatorily retired. The court held that there is no statutory prohibition against retirement on a pension, and so long as the retirement benefits are substantial, the forced retirement would not be a "subterfuge to evade the purposes of the Act." We also disagree with the third circuit's interpretation of this section....

In McMann v. United Airlines, 542 F.2d 217 (4th Cir. 1976) cert. granted 429 U.S. 1090 (1977), the Fourth Circuit Court of Appeals held that section 4(f)(2) did not permit mandatory retirement pursuant to the terms of a collective bargaining agreement or pension plan....

The amendment to section 4(f)(2) serves to express congressional approval of the result reached by the fourth circuit in McMann.

S. Rept. 95-493, 95th Cong., 1st Session, 1977, at 10.

That same report also reflected congressional understanding that, aside from the issue of mandatory retirement, Section 4(f)(2) had been properly interpreted to require economic justifications for any reduction in employee benefits. The report stated:

Concerns were also expressed regarding potential increased costs for employee welfare benefit plans such as disability, health, life and other forms of insurance for employees. Presently some employers reduce coverage for older workers under these plans or increase the required employee contribution as workers advance in age. This bill would not alter existing law with respect to these practices. Existing principles of law, including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by which these practices will be evaluated.

Id. at 5. Clearly, Congress both understood and intended that "existing principles of law" would be applied to

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workers covered for the first time by the 1978 amendments. 2/ Those "existing principles of law" were embodied, in part, in the Department of Labor's 1969 interpretation of Section 4(f)(2) which set forth the "equal benefit or equal cost" principle. 29 C.F.R. 860.120 (1969). It is a general principle that Congress is presumed to have endorsed an administrative interpretation when it re-enacts a statute without change. Lorillard v. Pons, 434 U.S. 575, 580 (1978).

Legislative action after the Supreme Court's decision in McMann further corroborates the conclusion that McMann had no substantive implications other than those dealing with mandatory retirement. The conference report on H.R. 5383, issued on March 14, 1978, stated:

> In McMann v. United Airlines, 98 S.Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 (1976). The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.

Conf. R. 95-950, 95th Cong., 2d Sess. (1978) at 8. (Emphasis added). During the Senate debates following the Conference Report, Senator Javits recited, almost verbatim, the "equal benefit or equal cost" principle as representative of his understanding of current law. 124 Cong. Rec. S.4450 (March 23, 1978). Senator Williams did the same, 124 Cong. Rec. S.4451, as did no less than four members of the House. See 124 Cong. Rec. H.2270-2277 (March 21, 1978) (remarks of Cong. Hawkins, Pepper, Weiss, Waxman).

This understanding was further underscored by the extensive colloquies on the "Elisburg letter" and the issue of post-normal retirement age pension contributions and crediting. Had Congress understood the McMann holding to permit the arbitrary cessation of benefits in a pre-ADEA plan, it is highly unlikely that they would have belabored that issue.

2/ The 1978 legislative history reveals that this was also the understanding of several prominent legislators. See 123 Cong. Rec. S.10,955 (June 28, 1977) (remarks of Sen. Javits); 123 Cong. Rec. S.17,274 (October 19, 1977) (remarks of Sen. Williams).

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Similarly, congressional instructions to the Department of Labor to "issue more comprehensive guidance with respect to Section 4(f)(2)" would have been unnecessary. See 44 F.R. 30648 (May 25, 1979) and citations therein.

The Commission has taken the position in its litigation that McMann has no substantive implications concerning section 4(f)(2). In EEOC v. Borden's, Inc., 33 FEP 1708 (9th Cir. 1984) the Commission argued that "In the absence of actuarial data which clearly demonstrates that the costs of [benefits] are uniquely burdensome to the employer," they may not be reduced or eliminated based on age. See EEOC's Brief citing to 124 Cong. Rec. H.2277, March 21, 1977 (remarks of Cong. Waxman). The Court in Borden's concluded that McMann had been "overruled by congressional amendment." 33 F.E.P. Cases at 1713, n.4.

In EEOC v. Westinghouse Electric Corp., 33 FEP Cases 945 (3rd Cir. 1983), Westinghouse had argued that Section 4(f)(2) permitted it to terminate employee benefits based on age pursuant to the terms of a bona fide plan. Describing that position as "draconian," the EEOC's brief argued that Section 4(f)(2) applies only to plans which involve age-related cost considerations. The Third Circuit agreed and held that Westinghouse's layoff income and benefit plan was not covered by Section 4(f)(2) because the exception applied only to plans which involved age-related cost factors. 33 F.E.P. Cases at 954-955. In the brief in opposition to Westinghouse's Petition for Certiorari, filed by the Department of Justice on behalf of the EEOC, the government argued that the Department of Labor's interpretation of section 4(f)(2), which specifically limits the exception to employee benefit plans that have a cost factor related to age, was endorsed by Congress. The brief notes that Congress twice amended the ADEA subsequent to this interpretation, including section 4(f)(2) itself, without indicating any dissatisfaction with the administrative interpretation of the section. As the brief states, this is strong evidence that Congress endorsed that interpretation because "Congress is presumed to be aware of an administrative ... interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (Citations omitted). Lorillard v. Pons, 434 U.S. 575, 580 (1978); see EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981).

The situation presented by McMann is analogous to the situation that was presented by the Pregnancy Discrimination Act, Pub. Law 95-555, 92 Stat. 2076. The Pregnancy Discrimination Act

was passed by Congress in response to the decision of the Supreme Court in General Electric Co. v. Gilbert, 429 U.S. 125 (1976). In Newport News Shipbuilding Co. v. EEOC, 32 FEP Cases 1 (1983), the continued vitality of the reasoning in Gilbert in light of the PDA was at issue. The Court noted that in passing the Pregnancy Discrimination Act Congress had "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision." 32 FEP Cases at 5. Thus, the Supreme Court concluded that Gilbert no longer had any vitality. Similarly, as discussed earlier, Congress expressly repudiated both the holding and the reasoning in McMann.

The September 11, 1984, memorandum on early retirement incentives did not include a discussion of the 4(f)(2) analysis contained in McMann for the reasons already discussed. In addition, we note that Option 2 of that memorandum on the waiver of actuarial reductions, pages 5-7, argues that such an early retirement incentive is lawful under the ADEA because it complies with section 4(a). Thus there was no need to discuss the 4(f)(2) exception.

With respect to the payment of incentives, such as cash bonuses, to induce early retirement, this office recommended that such incentives be deemed lawful under certain circumstances. See pages 10-11 and 14 of the early retirement incentives memorandum. That discussion of the incentive, as well as option 2 on the incentive at pages 11-13, we believe clearly addresses your concerns about the lawfulness of early retirement incentives.

ERISA

With respect to your comments that we have failed to discuss a pertinent section of ERISA we offer the following observations. My April 30, 1984, memorandum on post-normal retirement age pension accruals recognizes that arguments have been made that the Commission's modification of the "special rules" would create a conflict with ERISA. The memorandum, on pages 15 to 18, focuses on the Department of Labor provisions of ERISA and the testimony of Donald E. Elisburg. The memorandum does not refer directly to section 411(b)(1)(C). It does address the concern that any change to the "special rules" will create a conflict with ERISA. It also specifically discusses 26 C.F.R. 411(c)-1(f)(2), which was promulgated under IRC §411.

In addition, the question of a conflict with ERISA was raised by this office during informal coordination with the Internal Revenue Service 3/ under E.O. 12067 in 1979 and 1980. The question was again raised with the IRS this year in the context of the Commission's vote on the proposed changes. Both the meetings in 1979 and 1980 and the contacts this year were with IRS officials involved with employee benefits. We were directed to those officials in IRS because they presumably had the expertise on ERISA and the knowledge of what IRC sections might be affected by the special rules. At no time has section 411 of the IRC been raised as creating a conflict with the proposed changes to the "special rules."

Section 411 of the IRC is titled "Minimum Vesting Standards." It sets forth the minimum vesting requirements that an employer must satisfy in order to have a qualified plan. Under 411(a), a plan is not qualified unless it provides that an employee's right to his normal retirement benefit is nonforfeitable upon attainment of normal retirement age and, in the case of defined benefit plans, satisfies, inter alia, the requirements of §411(b)(1). Section 411(b)(1), titled "Accrued Benefit Requirements," sets forth rules for establishing the minimum accrued benefit to which an employee is entitled. Section 411(b)(1)(C), on which you focus, provides that a defined benefit plan satisfies the requirements of subsection (b) if the accrued benefit to which any participant is entitled upon his separation from service is not less than a fraction of the annual benefit to which he would be entitled at normal retirement age if he had continued to work until normal retirement age. Thus, for purposes of determining benefit entitlement, an employer may use an employee's normal retirement date to determine the fraction of benefits the employee is entitled to upon separation from service. This minumum requirement must be satisfied for a plan to be qualified. As you note, the normal retirement age contained in a plan may be less than 65.

Section 411(b)(1)(C) sanctions the use of the normal retirement date to compute the benefits to which an employee would be entitled if he had worked to that date. The section

3/ The Internal Revenue Service is responsible for enforcing the Internal Revenue Code provisions of ERISA.

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sets forth the minimum benefit to which an employee must be entitled at a specific time. These minimum requirements have no effect on the requirement of the ADEA vis-a-vis pension accruals. 4/

ERISA sets forth the minimum requirements of a pension plan. ERISA, however, does not set forth the only requirements. As an example, ERISA requires the use of actuarial determinations or computations. See e.g., 26 CFR §§1.401-(b)(1)(i); §1.401-2(b)(1). In the past, insurance companies have used sex-based mortality tables to calculate retirement benefits. The use of such tables is not prohibited by ERISA. The Supreme Court, however, concluded in Arizona Governing Committee v. Norris, 103 S.Ct. 3492 (1983), that the use of such tables is prohibited by Title VII of the Civil Rights Act of 1964, as amended. Thus, compliance with the terms of ERISA does not necessarily mean that an employer is complying with the requirements of other statutes.

The ADEA, like Title VII, is remedial in nature. It requires employers to insure that all individuals are treated nondiscriminatorily. The modifications to the "special rules," like the prohibition on the use of sex-based mortality tables, add other requirements that an employer must satisfy in order to have a lawful plan. Again, this was discussed in our April 30th memorandum.

COURT CASES

Finally, you inquired why cases such as Alford v. City of Lubbock, 27 FEP Cases 1075 (5th Cir. 1982), and Patterson v. Independent School District #709, 35 FEP Cases 1236 (8th Cir. 1984), were not discussed in our recent memoranda.

Alford concerned two issues: the exclusion from the pension plan of the plaintiff and the failure of the City of Lubbock

4/ As we have already noted, IRC §411(b)(1) sets forth 3 alternative methods for qualifying a plan. Section 411(b)(1)(A) describes the 3-percent method. Pursuant to regulations promulgated by the Internal Revenue Service to enforce this subsection, in order to satisfy this alternative a participant must be entitled to an accrued benefit computed using his years of participation, not to exceed 33 1/3, including years of participation after normal retirement age. 26 CFR §1.411(b)-1(b)(1). It would be anomalous to conclude that Congress prohibited accrual of benefits after normal retirement age under one test while requiring it under another.

to pay the plaintiff for accrued sick leave at the time of his separation from service. With respect to the exclusion of the plaintiff from the pension plan, the Court concluded that such exclusion was in accordance with the terms of a bona fide pension plan and thus protected by Section 4(f)(2). In so holding the court rejected the interpretations of the ADEA promulgated by the Department of Labor and continued in effect by EEOC. It has been the position of the Offices of General Counsel and Legal Counsel that this portion of the Alford decision is incorrect. The Commission's position has been that it is unlawful to exclude from a pension plan anyone hired more than five years prior to normal retirement age.

With respect to the second issue, refusal to pay accrued medical payments, the court found that this was not an employee benefit plan within the meaning of 4(f)(2). The reasoning of the court is identical to that set forth in option 1 at pages 10-11 of our memorandum on early retirement incentives, where we concluded that this particular incentive is in the nature of a fringe benefit. That analysis cites Borden's and Westinghouse in support. Both of these cases cite Alford and are the latest cases on point.

Patterson was not published and received until after our latest memorandum had been issued. This office had prepared to analyze and discuss Patterson at the Commission meeting in which early retirement incentives was on the agenda. The item was then pulled from the agenda. Prior to receipt of your inquiry, we had already started preparing a briefing memorandum for the Commission, which you will be receiving shortly. That memorandum concludes that Patterson does not alter our previous analysis.

Please inform me if you desire any additional briefing on these issues.

CC: S. Kiszkiel
C. Mackaronis
sec chron
OLC-LS:SKISZKIEL/CMACKARONIS/dt:10/16/64
SMR:

NOV 14 1984

MEMORANDUM

TO : Jeffrey I. Zuckerman
Chief of Staff

FROM : Allyson K. Duncan
Acting Associate Legal Counsel

SUBJECT : Development of case law on "bona fide" and "subterfuge" under §4(f)(2) of the ADEA.

Section 4(f)(2) of the Age Discrimination in Employment Act of 1967, as amended, provides that:

> (1) It shall not be unlawful for an employer, employment agency, or labor organization --
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

You have asked us to analyze the cases that define the terms "bona fide" and "subterfuge" as they are used in that exception, i.e. as they relate to employee benefit plans. Our analysis is set forth below. We have confined our analysis to cases at the appellate court level because the discussion at that level is so extensive.

Bona Fide

The term "bona fide" as used with employee benefit plans was originally defined to mean that the plan exists and pays benefits, McMann v. United Air Lines, 542 F. 2d 217 (4th Cir. 1976), reversed 434 U.S. 192 (1977); or that the plan is authentic or genuine and pays benefits, Brennan v. Taft Broadcasting, 500 F. 2d 212 (5th Cir. 1974). The definition that a plan is bona fide if it exists and pays benefits was accepted by the Supreme Court in United Air Lines v. McMann, 434 U.S. 192 (1977). The Supreme Court's decision in McMann has been followed by the courts.

A majority of the decisions have explicitly required that an employee benefit plan must exist and pay substantial benefits in order to be bona fide. Patterson v. Independent School District #709, 742 F. 2d 463 (8th Cir. 1984); EEOC v. Borden's Inc., 724 F. 2d 1390 (9th Cir. 1984); Alford v. City of Lubbock, 664 F. 2d 1263 (5th Cir. 1982); EEOC v. Home Insurance Co., 672 F. 2d 252 (2nd Cir. 1982); Carpenter v. Continental Trailways, 635 F. 2d 578 (6th Cir. 1980); EEOC v. Baltimore and Ohio R. Co., 632 F. 2d 1107 (4th Cir. 1980); Jensen v. Gulf Oil Refining and Marketing Co., 623 F. 2d 406 (5th Cir. 1980); Marshall v. Hawaiian Telephone Co., 575 F. 2d 763 (9th Cir. 1978). A minority of the decisions have found that an employee benefit plan is bona fide if it exists and pays benefits, and have not addressed the issue of how substantial the benefits must be. EEOC v. Westinghouse Electric Co., 725 F. 2d 211 (3rd Cir. 1983); Crosland v. Charlotte Eye, Ear and Throat Hospital, 686 F. 2d 208 (4th Cir. 1982); Conselves v. Caterpillar Tractor Co., 634 F. 2d 1065 (7th Cir. 1980); Smart v. Porter Paint Co., 630 F. 2d 490 (7th Cir. 1980).

Subterfuge

A. Pre-McMann

The phrase "subterfuge to evade the purposes of this Act" was originally defined in de Loraine v. MEBA Pension Trust, 499 F. 2d 49 (2nd Cir.), cert. denied 419 U.S. 1009 (1974). In that case the Second Circuit Court of Appeals held that the trust at issue could not be a subterfuge because it was established before the enactment of the ADEA and paid substantial benefits. In that same year the Fifth Circuit decided Brennan v. Taft Broadcasting Co., 500 F. 2d 212 (5th Cir. 1974). That case involved the involuntary retirement of an employee at age 60 pursuant to a benefit plan that had been established in 1963. The court held that the plan could not be a subterfuge to evade the purposes of the Act because it had been adopted far in advance of the enactment of the ADEA. In Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), a case involving an early retirement option for a federal employee, the court reiterated its holding in Brennan by noting that it was highly unlikely that the retirement plan at issue could be a subterfuge because it predated the enactment of the ADEA.

In McMann v. United Air Lines, 542 F. 2d 217 (4th Cir. 1976), the Fourth Circuit held that the mere existence of a plan prior to the enactment of the ADEA was not sufficient to establish that the plan was not a subterfuge. The court reasoned that what was forbidden was not a subterfuge to evade the Act, but a subterfuge to evade the purposes of the Act. Since the purpose of the ADEA was to prohibit arbitrary age discrimination, there must be some reason other than age to justify a plan that discriminates. That reason had to be some economic or business purpose for the challenged provision of the plan.

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The Third Circuit, in Zinger v. Blanchette, 549 F. 2d 901 (3rd Cir. 1977), cert. denied 434 U.S. 1008 (1978), also rejected the reasoning in Brennan by concluding that the fact that a benefit plan predated the ADEA did not establish that it was not a subterfuge. Like the Fourth Circuit, the court found that a plan must not be a subterfuge to evade the purposes of the Act. The Zinger court, however, drew a distinction between a discharge without compensation and a retirement on an adequate pension. It determined that Congress had regarded retirement plans favorably and chose to legislate only with respect to discharges. The court went on to reject the business purpose argument enunciated in McMann and concluded that retirement pursuant to a bona fide plan when accompanied by a reasonable pension was not a subterfuge. The Third Circuit reaffirmed its holding in Zinger in Rogers v. Exxon Research and Engineering Co., 550 F. 2d 834 (3rd Cir. 1977), cert. denied 434 U.S. 1022 (1978).

Subsequent to the decisions in Zinger and Brennan and the Fourth Circuit decision in McMann, but prior to the Supreme Court's decision in McMann, the Senate issued a report on H.R. 5383, which contained amendments to the ADEA. The Senate Report, S. Rept. 95-493, 95th Cong., 1st Session (1977) at 10, specifically endorsed the results reached by the Fourth Circuit and rejected the holdings in Zinger and Brennan. The Senate Report stated that section 4(f)(2) was not intended to permit the forced retirement of employees pursuant to the terms of a retirement plan.

On December 12, 1977, the Supreme Court rendered its decision in United Air Lines v. McMann, 434 U.S. 192 (1977). In holding that the ADEA did not prohibit all mandatory retirements of employees prior to age 65 because of section 4(f)(2), the Court adopted the Brennan court's rationale with respect to the meaning of subterfuge. The Court specifically found that the establishment of a bona fide retirement plan long before the enactment of the ADEA eliminated any question about whether the plan was a subterfuge. The Fourth Circuit's reasoning which had distinguished between the Act and the purposes of the Act was rejected. The Supreme Court noted that it would be difficult to conceive of a subterfuge that evaded one but did not evade the other.

The Conference Committee Report, House Report No. 95-950, 95th Cong. 2nd Session (1978) at 8, on H.R. 5383, issued after the Supreme Court's decision in McMann, disagreed with that decision. In fact, the Report noted that the conferees "specifically disagree" with the Supreme Court's "holding and reasoning" in McMann. 1/

1/ The Conference Committee Report states:

House recedes to the Senate amendment.

The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.

In McMann v. United Airlines, 98 S. Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F. 2d 217 (1976). The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.

H. R. 5383, amending the ADEA, including section 4(f)(2), was signed into law on April 6, 1978 and became Public Law 95-256.

B. Post-McMann

Despite the apparent disagreement of Congress with the reasoning in McMann, the appellate courts began immediately to cite the decision on the subterfuge issue. In Minton v. Whirlpool Corp., 569 F. 2d 1012 (7th Cir. 1978), the court held that because the defendant's retirement plan was in effect prior to the enactment of the ADEA it could not be a subterfuge. No mention was made of the 1978 amendments to the Act or their effect on McMann. In Marshall v. Hawaiian Telephone Company, 575 F. 2d 763 (9th Cir. 1978), the lawfulness of a plan established prior to the ADEA was again at issue. Relying on the decision in McMann, this court also found that the plan could not be a subterfuge because it predated the enactment of the ADEA, and also did not address the effects, if any, of the 1978 amendments.

In Morelock v. NCR Corp., 586 F. 2d 1096 (6th Cir. 1978), cert. denied 441 U.S. 906 (1979), a court that was aware of the 1978 amendments continued to cite McMann on subterfuge. In this case, however, the court cited that portion of the McMann decision that gave subterfuge its ordinary meaning, i.e. a scheme, plan, stratagem or artifice of evasion. The court found that the seniority system at issue in this case did not meet that definition of subterfuge. Similarly, Sikora v. American Can Co., 622 F. 2d 1116 (3rd Cir. 1980), involved a retirement plan established prior to the ADEA. Although aware of the 1978 amendments, the court relied on McMann in holding that a plan established prior to the ADEA cannot be a subterfuge. The court further noted that alterations of the plan made subsequent to the enactment of the ADEA may be examined to see if they were designed to evade the purposes of the Act.

Jensen v. Gulf Oil Refining and Marketing Co., 623 F. 2d 406 (5th Cir. 1980), which involved a 1977 involuntary retirement at age 51, was the first of a number of cases that held that the 1978 amendment to section 4(f)(2) of the ADEA could not be applied retroactively. The court went on to hold that the plan at issue, which was established in 1944, could not be a subterfuge because it pre-dated the ADEA. In applying the pre-amendment ADEA to the fact situation presented, the court also stated that McMann had rejected any per se rule requiring that an employer demonstrate a business or economic reason in order to satisfy the subterfuge requirement.

Smart v. Porter Paint Co., 630 F. 2d 490 (7th Cir. 1980), Gonsalves v. Caterpillar Tractor Co., Inc., 634 F. 2d 1065 (7th Cir. 1980), and Carpenter v. Continental Trailways, 635 F. 2d 580 (6th Cir. 1980), held that the 1978 amendment to section 4(f)(2) would not be applied retroactively. The courts then went on to cite the reasoning of McMann on subterfuge. In Smart v. Porter Paint Co., the court stated that subterfuge must be given its ordinary meaning. The court further held that while plans pre-dating the ADEA could

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not be subterfuges, amendments made to the plans subsequent to the enactment of the ADEA could be scrutinized. For these amendments an employer would have to show a non-discriminatory purpose. In Gonsalves v. Caterpillar Tractor Co., the court found that the 1977 version of the ADEA did not require an employer to show a business or economic purpose to justify a benefit plan that pre-dated the Act. Likewise, Carpenter v. Continental Trailways held that plans established prior to the ADEA could not be subterfuges. A plan adopted after the enactment of the ADEA may not be used as a stratagem or artifice to evade the Act. In this case the court found a retirement plan valid because it was adopted as a legitimate instrument to provide retirement benefits for employees.

In EEOC v. Baltimore & Ohio R. Co., 632 F. 2d 1107 (4th Cir. 1980), cert. denied 454 U.S. 825 (1981), the court found the question of the retroactivity of the 1978 amendments irrelevant because the changes to the plan in 1972 were a subterfuge to evade the goals of §2(b) of the ADEA by removing older workers. Here the facts indicated that the defendant amended its pension plan to provide for a lower mandatory retirement age after the decision had been reached to retire a group of workers who were under age 65.

Finally, in Sexton v. Beatrice Foods, 630 F. 2d 478 (7th Cir. 1980), the court, in discussing section 4(f)(2), stated that under McMann plans enacted prior to the ADEA could not be subterfuges. That case, which involved pre-amendment law, turned on the issue of whether the employer observed the terms of the plan.

Two more recent cases have discussed McMann without considering the effect of the 1978 amendments on that decision. In Alford v. City of Lubbock, 664 F. 2d 1263 (5th Cir.) cert. denied 456 U.S. 975 (1982), the court ruled on the lawfulness of excluding certain employees from a retirement plan. The court held that the plan could not be a subterfuge because it pre-dated the ADEA. 2/

In Patterson v. Independent School District #709, 742 F. 2d 465 (8th Cir. 1984), the court had to determine whether a retirement incentive program enacted in 1981 came within the section 4(f)(2) exemption. In discussing section 4(f)(2), the court noted that under McMann a benefit plan enacted prior to the ADEA could not be a subterfuge to evade the purposes of the Act. It further noted that the main point decided in McMann was that an involuntary retirement plan was permissible. It then concluded, relying on McMann and Mason v. Lister, 562 F. 2d 343 (5th Cir. 1978), that a voluntary plan, such as the one at issue in this case, was a fortiori permissible under section 4(f)(2).

2/ In discussing whether the plan in Alford was bona fide, the court compared section 4(f)(2) to section 703(h) in Title VII. The Court noted that the Supreme Court in International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977), had held that section 703(h) was designed to prevent Title VII from interfering with pre-Act seniority systems. The court analogized that §4(f)(2) of the ADEA was designed to provide the same protection to employee benefit plans that pre-dated the ADEA.

Although it appears that McMann may retain viability with respect to the definition of the term subterfuge, there is no question that its holding that section 4(f)(2) permits involuntary retirement of employees otherwise within the protective ambit of the ADEA was clearly overturned by the 1978 amendments to the ADEA. EEOC v. Borden's Inc., 724 F. 2d 1390, 1395 n.4 (9th Cir. 1984); Von Aulock v. Smith, 720 F. 2d 176 (D.C. Cir. 1983); Crosland v. Charlotte Eye, Ear & Throat Hospital, 686 F. 2d 208 (4th Cir. 1982). The validity of the Patterson decision therefore must be questioned.

As noted, all the above cases, except Patterson, applied pre-amendment law because the facts that gave rise to the lawsuits had transpired prior to 1978. Thus the cases did not analyze the effects of the 1978 amendments on the McMann decision. Two courts, however, have conducted a more complete analysis of the continued efficacy of McMann.

In EEOC v. Home Insurance Co., 672 F. 2d 252 (2nd Cir. 1982), it was conceded that the 1978 amendments were not retroactive. The plan in this case was adopted in 1948. In 1972 the mandatory and normal retirement ages under the plan were reduced to age 62. The issue was whether the lowering of those ages was a subterfuge to evade the purposes of the Act. In analyzing McMann the court stated that McMann does not purport to relieve all employers of any obligation to prove an economic or business purpose in order to disprove subterfuge. Where a plan is bona fide and its terms are observed, an employer can meet its burden of proving that its actions were not a subterfuge simply by showing that it was established long before the enactment of the ADEA. However, this avenue of proof is not open when the pertinent provisions of the plan were adopted after the ADEA was enacted. In those cases the employer will have to prove non-age-based reasons for its action. The employer, thus, must prove valid business reasons for its actions for plans and amendments to plans that do not pre-date the ADEA.

Crosland v. Charlotte Eye, Ear & Throat Hospital, 686 F. 2d 208 (4th Cir. 1982), also involved pre-amendment law. However, in its analysis the court specifically noted that the central premise of McMann, i.e. that the involuntary retirement of employees protected by the ADEA pursuant to the terms of a bona fide employee benefit plan was permissible, was overturned by the 1978 amendments. The court further noted however, that the Supreme Court's interpretation of the meaning of subterfuge was left undisturbed by the amendment. The court concluded that with respect to plans or amendments to plans that did not pre-date the ADEA, the absence of subterfuge can be demonstrated through the proof of a business or economic purpose for the provision in question. A plaintiff can rebut the employer's demonstration by showing that instead of a business or economic purpose the actual motivation for the provision in question was an ongoing scheme, plan or artifice of evasion, designed to thwart the purposes of the ADEA.

Conclusion

This Office has taken the position that the Supreme Court's decision in McMann retained no viability in analyzing section 4(f)(2) with respect to the issues of involuntary retirement and the exclusion of pre-existing benefit

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plans from the coverage of the ADEA. This position had been based on the 1978 amendment to section 4(f)(2) and the legislative history accompanying it. It is apparent from that legislative history that Congress endorsed the reasoning of the Fourth Circuit and repudiated that of the Supreme Court.

Nevertheless, a review of the cases cited above discloses that the Supreme Court's determination in McMann that plans pre-dating the ADEA could not be subterfuges retains viability, at least with respect to cases involving fact patterns that arise prior to 1978. All of the decisions, except that of the Eighth Circuit in Patterson, involve plans that existed prior to the 1978 amendments. Consequently, except for the Fourth Circuit in Crosland, none of the courts discusses the effects of the 1978 amendments on the Supreme Court's decision. Futhermore, the court in Crosland did not note or address the legislative history of the amendment.

In view of the above, we conclude that, with respect to fact situations that arose prior to 1978, an employer may demonstrate that a plan is not a subterfuge by proving that the plan either (1) predates the ADEA, or (2) has a valid business or economic purpose.

With respect to fact situations that occur subsequent to 1978, no court has specifically addressed whether a plan pre-dating the ADEA is automatically protected because of the reasoning in McMann. 3/ The Crosland decision intimates that pre-dating would be sufficient, but Crosland itself is decided on a pre-amendment fact pattern. It is clear, however, that absent pre-dating, a plan must have a valid business or economic purpose in order not to be a subterfuge.

3/ The Patterson case involved a post-amendment fact pattern. The court found McMann had continued viability for plans pre-dating the ADEA but failed to note or discuss the 1978 amendments.

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April 10, 1985

Ms. Allyson Duncan
Acting Legal Counsel
Equal Employment Opportunity
Commission
2401 E Street, NW - 2nd Fl.
Washington, DC 20507

Re: Freedom of Information Act
Request

Dear Ms. Duncan:

On June 26, 1984 the Commission approved two regulatory items under the Age Discrimination in Employment Act of 1967 as amended, "ADEA". The Commission approved the recision and promulgation of new regulations under the ADEA which would require employers to continue pension contribution and crediting for employees working beyond the normal retirement age specified in pension and retirement plans. Additionally, the Commission approved a proposed rule for publication in the Federal Register which would reverse longstanding Department of Labor policy concerning the applicability of the provisions of the ADEA to apprenticeship programs. The following itemized request, made pursuant to the provisions of the Freedom of Information Act and applicable Commission regulations, relates to those two items addressed and voted upon by the Commission at the June 26, 1984 meeting.

I hereby request copies of the following:

1) Any memoranda, letters, documents or writings relating, pertaining to, or addressing in any way apprenticeship programs under the ADEA which have been forwarded to the Office of Management and Budget since June 26, 1984;

2) Any documents, memoranda, letters or other writings relating, pertaining to, or addressing in any way apprenticeship programs under the ADEA transmitted from the Office of Management and Budget to the EEOC since June 26, 1984;

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700

Vita R. Ostrander *President* Cyril F. Brickfield *Executive Director*

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3) Any notes, memoranda, letters or writings, including notes on appointment calendars or other similar documents, reflecting, relating to, concerning or confirming meetings or conversations between employees of the EEOC and any employees of the Office of Management and Budget regarding apprenticeship programs under the ADEA since June 26, 1984;

4) Any and all memoranda, letters, writings, or other documents forwarded to the Office of Management and Budget or any other federal agency since June 26, 1984, pertaining or relating to pension contributions and crediting for employees working beyond the normal retirement age under the ADEA;

5) Any documents, memoranda, letters or writings forwarded to the EEOC or to employees of the EEOC from the Office of Management and Budget since June 26, 1984, pertaining or relating to pension contributions and crediting for employees working beyond the normal retirement age under the ADEA;

6) Any notes, memoranda, letters, including notes on appointment calendars or similar documents reflecting, relating to, concerning or confirming meetings or conversations between any employees of the EEOC and any employees of the Office of Management and Budget concerning pension contributions and crediting for employees working beyond the normal retirement age under the ADEA since June 26, 1984.

The American Association of Retired Persons is a not-for-profit membership corporation of more than 18 million persons over the age of 50. AARP is the largest organized group of older Americans in the country. In representing the interest of its members AARP seeks to: a) enhance the quality of life for older persons, b) promote independence, dignity and purpose for older persons, c) lead in determining the role and place of older persons in society, d) sponsor research on physical, psychological, social, economic and other aspects of aging, e) represent the point of view of older persons as members of the work force. In keeping with its purposes, the AARP has devoted itself to investigating and working to alleviate problems resulting from age discrimination in employment as well as other aspects of life. Consistent with these purposes, AARP has for several years been tracking the EEOC's consideration of both the pension accrual

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issue for workers beyond the normal retirement age as well as the apprenticeship issue under the ADEA. The requested information will enable us to continue to stay abreast of the regulatory developments at the EEOC and to provide a valuable service to millions of our members by informing them of the up-to-date state of the law and its implementing regulations.

For these specific reasons, I request that the EEOC waive any search and copying costs as primarily benefitting the public and being generally in the public interest. In the event that you preliminarily do not agree that providing the information free of cost would be in the public interest, I am prepared to pay a search and copying fee of up to $50.00 for the requested materials. In the event that you estimate the search costs to exceed the specified amount, I request that you have the appropriate member of your staff contact me in order to secure advanced approval prior to compiling the requested information. I can be reached locally at 202-662-4957.

Sincerely,

Christopher Mackaronis

Christopher Mackaronis
Senior Coordinator
Advocacy Programs
Worker Equity Department

CM/pb

cc: Jeffrey Zuckerman
John Pagano
Paul Brenner
Dan Williams

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

RECEIVED
JUL 12 1985
ADVOCACY PROGRAMS SECTION
WORKER EQUITY DEPARTMENT

JUN 20 1985

Christopher G. Mackaronis
Senior Coordinator
Advocacy Programs, Worker Equity Department
American Association of Retired Persons
1909 K Street, N.W.
Washington, D.C. 20049
CERTIFIED NO. P31 8562221
RETURN RECEIPT REQUESTED

In Response Refer To: 85-4-FOIA-71

Chris
Dear Mr. Mackaronis:

By letter dated May 15, 1985, we informed you that we would continue to search for documents responsive to your Freedom of Information Act request. We have concluded our search and have identified the following documents that come within your request:

1. Notes on the personal appointment calendar of J. Zuckerman concerning meetings with employees of OMB;

2. A letter from J. Zuckerman to OMB dated February 20, 1985; and

3. A letter from Douglas Ginsburg, Administrator for Information and Regulatory Affairs, OMB, to Clarence Thomas, Chairman, EEOC, dated February 13, 1985.

Your request for the notes contained on the personal appointment calendar is denied because these notes are not agency records for purposes of the FOIA. The issue of whether appointment calendars are records under the FOIA was addressed in BNA v. Department of Justice, 742 F.2d 1484 (D.C. Cir. 1984). Relying on Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980), the Court concluded that appointment calendars that are not distributed to other employees but are retained solely for the convenience of the individuals maintaining the calendars are not agency records subject to the FOIA. That reasoning applies to this appointment calendar.

The two letters are denied to you pursuant to the fifth exemption to the FOIA, 5 U.S.C. §552(b)(5). Pursuant to this exemption an agency may withhold:

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency,

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This exemption encompasses records which would normally be privileged in the civil discovery context. It covers internal communications within the executive branch of the Government to the extent that they are deliberative. Renegotiation Board v. Gruman Aircraft Engineering Corp, 421 U.S. 168 (1975); NLRB v. Sears, Roebuck and Co., 421 U.S. 132 (1975). A record is within the ambit of the deliberative privilege, and thus the fifth exemption, if it embodies a recommendation or proposal. These two letters clearly come within this exemption.

You may appeal the partial denial of your FOIA request by writing, within 30 days of receipt of this decision, to the Legal Counsel, EEOC, 2401 E Street, N.W., Washington, D.C. 20507.

Sincerely,

Stuart Frisch
Acting Associate Legal Counsel
Legal Services

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1217 North Belgrade Road
Silver Spring, Maryland 20902

March 17, 1986

The Honorable Orrin G. Hatch,
Chairman,
Committee on Labor and Human Resources,
United States Senate,
Washington, D.C. 20510.

Dear Chairman Hatch:

In a letter to you dated March 4, 1986, Senator Kennedy asked that I provide a list of the names and positions of the persons who attended certain meetings. I am pleased to provide the following information in response to Senator Kennedy's request.

1. I attended three meetings of the Special Assistants to the Commissioners during the Fall of 1984 at which a set of draft regulations interpreting the Equal Pay Act were discussed. The dates of those meetings, and the other persons who attended them, were:

November 1, 1984

Michael Baldonado, Special Assistant to Commissioner Gallegos
Marjorie Borders, Special Assistant to the Legal Counsel
Lorraine Davis, Special Assistant to the General Counsel
Anthony DeMarco, Assistant Legal Counsel
Frederick Ford, Attorney, Office of Legal Counsel
Raj Gupta, Special Assistant to Commissioner Webb
Johnnie Johnson, Attorney, Executive Secretariat
Sandra Little, Special Assistant to Chairman Thomas
Cynthia Matthews, Executive Officer
Karen Morton, Attorney, Office of Legal Counsel
Barbara Parris, Policy Analyst, Executive Secretariat
Jaime Ramon, Special Assistant to Commissioner Gallegos
Pam Talkin, Special Assistant to Commissioner Alvarez
Doris Werwie, Special Assistant to the Director, Office of Program Research

November 15, 1984

Mss. Borders, Little, Matthews, Parris and Talkin
Messrs. DeMarco, Ford, Gupta and Ramon

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December 13, 1984

Mss. Little, Matthews, Morton, Parris and Talkin
Messrs. DeMarco, Ford, Gupta, Johnson and Ramon
Sylvia Danovitch, Special Assistant to Commissioner Silberman
Cassandra Henoken, Special Assistant to Commissioner Webb
Grant Morris, Special Assistant to Commissioner Silberman

2. On September 25, 1984, I attended a meeting of the "Pension Policy Working Group," in the office of Dr. William Niskanen, a member of the President's Council of Economic Advisers. In addition to Dr. Niskanen and me, the following individuals were present:

Tom Antrus, Office of Management and Budget
Jim Brown, Office of Management and Budget
Allyson Duncan, Acting Associate Legal Counsel, EEOC
Joe Grundfest, Council of Economic Advisers
Richard Ippolito, Department of Labor
Chris Mackaronis, Attorney, Office of Legal Counsel, EEOC
Jay Pagano, Assistant Legal Counsel, EEOC
Kevin Furt, Pension Benefit Guaranty Corporation
Stu Sirkin, Internal Revenue Service
Charles Tharp, Pension Benefit Guaranty Corporation
Kathy Utgoff, Council of Economic Advisers
Tom Veal, Pension Benefit Guaranty Corporation

3. I have attended four meetings at the Office of Management of Budget at which the pension benefit accrual issue has been discussed. The dates of those meetings, and the other persons who attended them, were:

February 14, 1985

Tom Arthur, Office of Management and Budget
Jimmy Mason, Office of Management and Budget
Arnold Strosser, Office of Management and Budget
Kathy Utgoff, Council of Economic Advisers
Nancy Wentzler, Office of Management and Budget

March 19, 1985

Fred W. Alvarez, Commissioner, EEOC
Jim Brown, Office of Management and Budget
Michael Horowitz, Office of Management and Budget
R. Gaull Silberman, Commissioner, EEOC

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June 17, 1985

Jimmy Mason, Office of Management and Budget
Nancy Wentzler, Office of Management and Budget

June 27, 1985

Doug Ginsburg, Office of Management and Budget
Michael Horowitz, Office of Management and Budget
Clarence Thomas, Chairman, EEOC
Joe Wright, Office of Management and Budget

Please let me know if there is any further information that Senator Kennedy or any other member of the Committee would like me to provide.

Sincerely yours,

Jeffrey I. Zuckerman

Mr. METZENBAUM. The committee hearing stands adjourned.
[Whereupon, at 11:35 a.m., the committee was adjourned.]

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